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DETERMINATION OF PROPERTY RIGHTS UPON DIVORCE IN SOUTH CAROLINA: AN EXPLORATION AND RECOMMENDATION

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I. INTRODUCTION

American jurisdictions employ a variety of methods to determine the rights of divorcing parties in real and personal property held by them while married.[1] Four community property ju-

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This author's purpose is to explore a developing area of South Carolina law through a description of the approach taken by the South Carolina Supreme Court and an attempt to discern, for the use of the bench and bar, the possible structure and consequences of that approach in light of the national perspective. The article raises, but intentionally does not at this time explore, underlying issues of the state's role in ordering interpersonal relationships. This author plans to use the interaction of federal and state domestic relations law to explore these issues in later works.

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1. Although this article focuses on the theories of special equity and equitable distribution for court-effected division of marital property between divorcing spouses, theories exist which allow courts to prevent the misappropriation of marital property by either spouse during the marriage. A wife's common-law dower right gives her an inchoate right to one third of her husband's land, C. KARESH, WILLS 1 (1977), during the duration of her marriage. S.C. CODE ANN. § 21-5-310 (1976). *See* Shelton v. Shelton, 225 S.C. 502, 83 S.E.2d 176 (1954). A husband's common-law curtesy right, which gave him a life estate in his wife's lands, C. KARESH, WILLS 3 (1977), has been statutorily abolished in South Carolina. S.C. CODE ANN. § 21-5-10 (1976). One spouse may establish a resulting trust in property held by the other. See note 22 and accompanying text *infra*. Finally, some courts in other jurisdictions have been willing to impose a constructive trust for the benefit of one spouse on property held by the other. *See, e.g.*, Firestone v. Firestone, 263 So. 2d 223 (Fla. 1972). *Cf.* Murdoch v. Murdoch, 41 D.L.R.3d 367, 377 (1973)(Laskin, J., dissenting)(constructive trust should be imposed on business property in favor of spouse

risdictions normally divide the property of the parties equally upon divorce.[2] The remaining five community property jurisdictions apportion the property of the community between divorcing parties by using methods of equitable distribution, which are based on consideration of various facts and circumstances.[3] In a substantial majority of common-law property jurisdictions, courts are authorized to effect an equitable distribution of accumulated property,[4] while courts in the remaining jurisdictions have no general or equitable power to distribute property, and title alone controls.[5]

The prevalence of some form of property distribution in common-law property states is of relatively recent vintage and represents a major shift in the traditional legal view of the marriage relation.[6] No common-law precedent directly substantiates

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who contributed physical labor to operation of business).

2. The four are California, Idaho, Louisiana, and New Mexico. *In re* Marriage of Tammen, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1976); Michelson v. Michelson, 86 N.M. 107, 520 P.2d 263 (1974); CAL. CIV. CODE § 4800 (West 1980); IDAHO CODE § 32-712 (Supp. 1980). *See* Roux v. Jersey Ins. Co., 98 So. 2d 906 (La. 1957).

3. The five are Arizona, Nevada, Puerto Rico, Texas, and Washington. Ivancovich v. Ivancovich, 24 Ariz. App. 592, 540 P.2d 718 (1975)(fault may not be considered); Shane v. Shane, 84 Nev. 20, 435 P.2d 753 (1968); Fuqua v. Fuqua, 541 S.W.2d 228 (Tex. Civ. App. 1976); Rogstad v. Rogstad, 74 Wash. 2d 736, 446 P.2d 340 (1968); ARIZ. REV. STAT. ANN. § 25-318 (Supp. 1980); NEV. REV. STAT. § 125.150 (1979); P.R. LAWS ANN. tit. 31, § 381 (1967), *construed in* Puigdollers v. Monroig, 14 P.R.R. 195 (1908); WASH. REV. CODE ANN. § 26.08.110 (1961).

4. Those jurisdictions include Alabama, Alaska, Arkansas, Colorado, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

5. Those jurisdictions are Mississippi, North Carolina, Virginia, and West Virginia.

6. The common-law notion of "unity of person" contemplated a marriage relationship in which the husband, as head of the household, assumed the responsibility to provide for the protection and support of his family, see notes 9-17 and accompanying text *infra*, and the wife assumed such duties as housekeeping and child-rearing. *See, e.g.*, Arrington v. Arrington, 150 So. 2d 473 (Fla. Dist. Ct. App. 1963); Baker v. Baker, _ S.C. _, 279 S.E.2d 601, 602 (1981). It has recently been observed, however, that "[m]arriage is no longer looked upon as a conjugal relationship in which the husband and wife perform traditional and separate roles, but rather it is viewed as a partnership between coequals." Note, *The Distribution of Marital Real Property Upon Divorce in West Virginia: The Need for Legislative Reform*, 82 W. VA. L. REV. 611, 613 (1980). The Commissioner's Prefatory Note to the UNIFORM MARRIAGE AND DIVORCE ACT explains that "[t]he distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership." *Id., reprinted in* 9A UNIFORM LAWS ANN. 93 (1979). State courts have likewise begun to

the view that both husband and wife have made material contributions to the economic well-being of the marriage unit by virtue of the marital relationship and irrespective of their individual activity in the economic marketplace. It is unclear whether this changed approach to property allocation is precisely in keeping with the views of the citizenry, but the rapid adoption[7] of the various forms of equitable distribution—with virtually no setbacks[8]—indicates that the pendulum is not likely to swing back rapidly to the pre-1950s pure-title view.

The near-nationwide acceptance of equitable allocation of marital property has been replicated in South Carolina, which, in some ways, has moved faster than the rest of the country. South Carolina and other common-law jurisdictions traditionally accepted the common-law theory of "unity of person," under which the individual legal existence of a woman ceased at marriage and her person, along with her lands and personal property, merged and was incorporated with that of her husband.[9] Before the ratification of the South Carolina Constitution of 1868, the husband received at marriage a vested interest in all real and personal property owned by his wife at the time of the marriage or acquired by her thereafter.[10] Upon marriage, the wife received a dower right in her husband's property[11] and was entitled to a "reasonably adequate and suitable home and support."[12] The South Carolina Constitution of 1868 permitted a married woman to retain as separate property any realty and personalty held at the time of her marriage or acquired by her

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embrace the partnership view of the marriage relationship. *E.g.*, Brown v. Brown, 300 So. 2d 719 (Fla. Dist. Ct. App. 1974); Dyer v. Tsapis, 249 S.E.2d 509 (W. Va. 1978).

7. *See generally* I. BAXTER, MARITAL PROPERTY, Preface II, at 6-7 (Foster Supp. 1980)(adapting Foster & Freed, *Law and the Family*, 1979 N.Y.L.J. (Oct. 31 & Nov. 1, 1979)).

8. An isolated setback occurred in New Jersey when the legislature enacted a statute effectively restricting a broad theory of equitable distribution that had been judicially evolved from an essentially standardless statute. *See* N.J. STAT. ANN. § 2A: 34-23 (Supp. 1980).

9. Clawson v. Hutchinson, 11 S.C. 323, 324 (1878). *See* Baker v. Baker, _ S.C. _, _, 279 S.E.2d 601, 602 (1981).

10. Bouknight v. Epting, 11 S.C. 71 (1878). *See generally* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433 (U. Chi. Ed. 1979).

11. Shelton v. Shelton, 225 S.C. 502, 83 S.E.2d 176 (1954).

12. State v. Bagwell, 125 S.C. 401, 118 S.E. 767 (1923). *See generally*, 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (U. Chi. Ed. 1979).

thereafter,[13] and this right was reenacted in the present state constitution.[14] The Married Women's Property Acts, enacted in the latter part of the nineteenth century, permitted the wife to earn money and to purchase and dispose of property and protected her separate property from her husband's creditors.[15] In addition, this legislation sanctioned joint ownership of property by husband and wife.[16] The Married Women's Property Acts did not diminish the wife's common-law dower right or her right to maintenance and support.[17]

When, following an amendment to the state constitution,[18] the South Carolina General Assembly enacted divorce legislation in 1949, courts were faced with the task of determining the property rights of divorcing parties. Legislation, which initially provided for alimony in satisfaction of the wife's right to maintenance and support,[19] now provides for alimony for either spouse.[20] Additional legislation specifies the termination of a wife's dower right upon divorce.[21] Divorcing parties customarily retained their separate property, determined by reference to legal title. Yet, if one spouse was able to establish with clear, defi-

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13. S.C. CONST. OF 1868 art. XIV, § 8.

14. S.C. CONST. art. XVII, § 9.

15. At common law, a married woman's personal property became the property of her husband as did the use of her real property and any income from it. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 7.1 (1968). "She could not make contracts, either with her husband or with others, . . . was not able to sue or be sued without joining her husband, . . . [and] could not make a will [or] testify either for or against her husband in civil or criminal suits." *Id.* (citations omitted). During the middle of the nineteenth century, states began enacting legislation designed to avoid these common-law legal disabilities. *Id.* at § 7.2. Although all states had adopted some type of married women's property legislation by 1900, South Carolina was among the first states to do so, *see* S.C. CODE ANN. §§ 20-5-10 to -80 (1976). By recognizing the right of a wife to sue and be sued in her own capacity, S.C. CODE ANN. § 20-5-10 (1976), South Carolina's legislation was among the most liberal. *See generally*, I. BAXTER, MARITAL PROPERTY § 2.2 (1973).

16. See Green v. Cannady, 77 S.C. 193, 57 S.E. 832 (1907); S.C. CODE ANN. §§ 20-5-10 to -80 (1976).

17. State v. Bagwell, 125 S.C. 401, 118 S.E. 767 (1923).

18. South Carolina's divorce legislation is now codified at S.C. CODE ANN. §§ 20-3-10 to -440 (1976 & Supp. 1980). For the text of the original legislation, see 1949 S.C. Acts 216, No. 137. The constitutional provision recognizing divorce is found at S.C. CONST. art. XVII, § 3.

19. 1949 S.C. Acts 216, No. 137, § 8. *See* McNaughton v. McNaughton, 258 S.C. 554, 189 S.E.2d 820 (1972).

20. S.C. CODE ANN. § 20-3-130 (Supp. 1980).

21. S.C. CODE ANN. § 20-3-190 (1976).

nite, and convincing evidence that his or her funds were either directly "advanced and invested" to acquire specific property or were traceable to its acquisition, the court could then find a resulting trust in his or her favor.[22]

In 1961, the South Carolina Supreme Court ruled that parties to a divorce could voluntarily confer jurisdiction on a court to determine their rights in jointly owned property.[23] Seven years later, the South Carolina General Assembly enacted a statute that gave family courts jurisdiction and authority to divide personal property in actions for divorce or separate maintenance.[24] In 1974, the supreme court broadened the jurisdiction of family courts by ruling that divorcing parties could voluntarily confer jurisdiction to divide separate property.[25] Two years later, the General Assembly amended the family court jurisdiction statute to authorize the courts to settle "all legal and equitable rights of the parties in and to the real and personal property of the marriage . . . , if prayed for in the pleadings."[26] The most recent amendment of the jurisdiction statute authorizes settlement of legal and equitable property rights upon request in the pleadings by either party.[27]

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22. *E.g.*, Green v. Green, 237 S.C. 424, 117 S.E.2d 583 (1960).

23. Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961). *See* H. CLARK, *supra* note 15, § 14.8, at 449 (1968).

24. 1968 S.C. Acts 2718, No. 1195 art. IV, § 34 provided that "[t]he [Family] Court shall have all the power and authority and jurisdiction by law vested in the circuit courts of the State in actions . . . [f]or . . . division of personal property, whether the same shall be in connection with an action for divorce or apart therefrom."

25. Moyle v. Moyle, 262 S.C. 308, 204 S.E.2d 46 (1974)(citing Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961)).

26. 1976 S.C. Acts. 1859, No. 690 art. III, § 2 amended 1968 S.C. Acts 2718, No. 1195 art. IV, § 34(1) to provide as follows:

> The [Family] Court shall have all the power and authority and jurisdiction by law vested in the circuit courts of the State in actions:
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> (1) For *divorce a vinculo matrimonii* and *a mensa et thoro* and for settlement of all legal and equitable rights of the parties in such actions in and to the real and personal property of the marriage, if prayed for in the pleadings thereto. *Id.*

27. 1979 S.C. Acts 118, No. 71, § 4A amended 1976 S.C. Acts 1859, No. 690 art. III, § 2 (codified at S.C. CODE ANN. § 14-21-1020 (1976)) to provide as follows:

> The [family] court shall have all power, authority and jurisdiction by law vested in the circuit courts of the State in actions for divorce *a vinculo matrimonii*, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in such actions in and to the real and personal property of the marriage and attorneys' fees, if requested by either party in the pleadings.

The South Carolina decisions dealing with division of marital property outside the traditional trust framework arguably reflect two distinguishable approaches: first, the application of a relatively well-defined "special equity" doctrine[28] and, second, apparent acceptance and implementation of a less clearly delineated doctrine of "equitable distribution."[29] The language of the decisions does not make it entirely clear whether these distinct doctrines are both to be applied under the statutory grant of jurisdiction or whether the court ultimately intends that they be treated as one doctrine,[30] combining aspects of each manner of determining equitable interests in marital property. This article will explore these doctrines as they have developed in South Carolina and other jurisdictions, their application, and the collateral consequences that may flow from the use of either doctrine or some amalgam of the two.

II. DETERMINATION OF THE PROPERTY RIGHTS OF DIVORCING PARTIES

The South Carolina Supreme Court has variously characterized its decisions settling the property rights of divorcing parties

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Id. The amended statute is now codified at S.C. CODE ANN. § 14-21-1020 (Supp. 1980).

Although the constitutionality of this enactment in the face of a due process challenge has not been raised in South Carolina, experience in other jurisdictions indicates that the state's police power is sufficient to justify a grant of jurisdiction for the apportionment of divorcing parties' property. *E.g.*, Fournier v. Fournier, 376 A.2d 100 (Me. 1977); Corder v. Corder, 546 S.W.2d 798 (Mo. 1977); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974). *But see* Willcox v. Penn Mut. Life Ins. Co., 357 Pa. 581, 593, 55 A.2d 521, 527 (1947). The South Carolina Supreme Court recently ruled that the state's jurisdiction statute does not violate the equal protection clause. Glass v. Glass, No. 21543 (S.C., filed Aug. 6, 1981).

28. Decisions in which this doctrine has been applied include Baker v. Baker, _ S.C. _, _, 279 S.E.2d 601, 602 (1981); Simmons v. Simmons, 275 S.C. 41, 267 S.E.2d 427 (1980); Poniatowski v. Poniatowski, 275 S.C. 11, 266 S.E.2d 787 (1980); Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979); and Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 566 (1978).

29. *E.g.*, Glass v. Glass, No. 21543 (S.C., filed Aug. 6, 1981); Jeffords v. Hall, _ S.C. _, 277 S.E.2d 703 (1981); Stone v. Stone, 274 S.C. 571, 266 S.E.2d 70 (1980); Young v. Young, 272 S.C. 433, 248 S.E.2d 588 (1978); Beasley v. Beasley, 264 S.C. 611, 216 S.E.2d 535 (1975); Moyle v. Moyle, 262 S.C. 308, 204 S.E.2d 46 (1974); Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961).

30. In Jeffords v. Hall, _ S.C. _, 277 S.E.2d 703 (1981), the supreme court affirmed an equitable distribution of marital property effected by the family court, relying for authority on its special equity rationale in Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 566 (1978).

as awards in satisfaction of a special equity or as approval of an equitable distribution of marital property.[31] Although these two approaches to apportioning property appear similar, the appearance is deceptive because significant differences accompany their superficial similarities. Both approaches permit a division of property between divorcing parties upon a showing of material contribution by the parties,[32] but fundamental conceptual differences distinguish the two doctrines, at least as they have developed outside South Carolina.

The special equity doctrine originated in a 1919 Florida decision[33] and subsequently has developed in that state as a method of ameliorating the harsh results of the common-law practice of determining property ownership solely by reference to title. Florida special equity decisions,[34] and now those in South Carolina,[35] have spoken of one spouse's securing rights in property acquired by the other. Evidencing a less than total departure from the common-law concept of unity of person, special equity decisions use language that suggests courts' unwillingness to recognize activities constituting "ordinary marital duties"—for example, a homemaker's services—as a material contribution sufficient to justify a special equity award.[36]

Equitable distribution, by contrast, is a doctrine that has developed in a large number of common-law property states[37] as a clear departure from the traditional determination of property ownership solely by reference to title. Rather than speaking of property in terms of the party who acquired it, courts effecting equitable distribution employ the concept of marital property.[38]

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31. Although the terms "special equity, " used in, *e.g., Simmons,* 275 S.C. at 42, 267 S.E.2d at 428, and "equitable distribution," used in *Glass,* No. 21543 (S.C., filed Aug. 6, 1981) predominate in South Carolina's marital property decisions, the court has used other nomenclature including "equitable interest," *Simmons,* 275 S.C. at 42, 267 S.E.2d at 428; "equitable share," *Poniatowski,* 275 S.C. at 12, 266 S.E.2d at 788; and "division of . . . equally owned property." *Id.* at 13, 266 S.E.2d at 788.

32. For a discussion of material contribution, see notes 73-89 and accompanying text *infra.*

33. Carlton v. Carlton, 78 Fla. 252, 83 So. 87 (1919).

34. *E.g.,* Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932); Arrington v. Arrington, 150 So. 2d 473 (Fla. Dist. Ct. App. 1963).

35. *E.g., Simmons,* 275 S.C. at 44, 267 S.E.2d at 429; *Wilson,* 270 S.C. at 222, 241 S.E.2d at 569.

36. See footnote 47 and accompanying text *infra.*

37. See note 4 and accompanying text *supra.*

38. For a discussion of marital property, see notes 95-105 and accompanying text

As a further departure from the common law, courts have discarded the concept of "ordinary marital duties" and generally admit evidence of the spouses' nonmarket household services for the purpose of valuing their material contributions.[39]

Because the South Carolina Supreme Court seems to have applied both the special equity doctrine and the theory of equitable distribution and has, on at least one occasion,[40] suggested that the two doctrines may be interchangeable, an analysis of both doctrines is warranted.

A. The Special Equity Doctrine

The South Carolina Supreme Court has adopted the following formulation of the special equity doctrine:

> Where a wife has made a material contribution to the husband's acquisition of property during coverture, she acquires a special equity in the property so accumulated which equity entitles her, on divorce, to an award in satisfaction thereof; and it is not a necessary prerequisite that the wife show that she has contributed by funds or efforts to the acquiring of the specific property awarded to her, but division may be had even though

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infra.

39. See note 78 and accompanying text *infra.*

40. See note 41 *infra.*

Although the South Carolina Supreme Court ruled in Ingram v. Ingram, 273 S.C. 113, 254 S.E.2d 680 (1979), that a party's failure to request a settlement of property rights in the pleadings rendered an award of property erroneous, the court ruled in Poniatowski v. Poniatowski, 275 S.C. 11, 266 S.E.2d 787 (1980), that an objection to a property settlement award when there was no request in the pleadings was waived by failure to object to introduction of evidence of material contribution. *Id.* at 13, 266 S.E.2d at 788 (citing 15 S.C. DIGEST, *Pleading* Key No. 406(9) (West 1952)). Decisions cited in the DIGEST section referred to by the court include Kennedy Lumber Co. v. Rickborn, 40 F.2d 228 (4th Cir. 1930), in which the Fourth Circuit Court of Appeals explained that "[g]enerally, if evidence is admitted without objection to prove a fact imperfectly pleaded, the defect will be deemed waived" but then went on to hold that this general "rule has no application where the pleading entirely fails to state a cause of action, or where the evidence supports a cause of action not alleged," *id.* at 231; and Taylor v. Winnsboro Mills, 146 S.C. 28, 143 S.E. 474 (1928), in which the South Carolina Supreme Court ruled that an item of negligence not alleged in a complaint but placed before the jury without objection could be considered.

The court in *Poniatowski* observed that because the property "was purchased with joint funds and operated by the parties' joint efforts, the award . . . could be considered a further division of jointly owned assets." 275 S.C. at 13, 266 S.E.2d at 788. Without expressly so stating, the court may have reached its result in a manner consistent with the theory of resulting trust. See note 22 and accompanying text *supra.*

> the wife has not contributed funds or efforts to the acquisition of specific property awarded to her.[41]

Since adopting the doctrine, the supreme court has explained that special equity is distinct from alimony and that, unlike alimony, an award in satisfaction of a special equity is not barred by a claimant's adultery, although adultery "is one of a panoply of considerations for the family court when determining an equitable division."[42] Further, the supreme court has ruled that the special equity interest must be based on "special facts and circumstances in favor of one party above and beyond normal marital obligations."[43]

Although other jurisdictions have adopted variations of Florida's special equity doctrine,[44] the South Carolina Supreme

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41. Wilson v. Wilson, 270 S.C. 216, 221, 241 S.E.2d 566, 568-69 (1978)(quoting 27B C.J.S. *Divorce* § 293 (1950)). The court recognized the doctrine without applying it in McKenzie v. McKenzie, 254 S.C. 372, 175 S.E.2d 628 (1970) and noted the doctrine again in Morris v. Morris, 268 S.C. 104, 232 S.E.2d 326 (1977)(declining to award the wife interest in real estate of husband but perhaps relying on doctrine to justify award of household furnishings and fixtures).

The family courts have statutory authority to settle all legal and equitable rights of divorcing parties in real and personal property of the marriage if requested by either party in the pleadings. S.C. CODE ANN. § 14-21-1020 (Supp. 1980). See note 27 *supra*.

42. Simmons v. Simmons, 275 S.C. 41, 44, 267 S.E.2d 427, 428 (1980). Although the court specifically held that a claimant's adultery does not bar the special equity award but may be taken into account in the determination of the amount of the award, the court's reasoning refers to the concept of fault in general:

> In making a division or distribution of property on granting a divorce, the court may consider the cause for which the divorce was granted and who was at fault, and, ordinarily, the circumstance of the fault has persuasive force, but is not of itself controlling, and does not justify the imposition of a severe penalty in the way of deprivation of property.

Id. at 44, 267 S.E.2d at 428 (citing 27B C.J.S. *Divorce* § 295(7) (1950)). For an extensive discussion of *Simmons*, see *Domestic Relations, Annual Survey of South Carolina Law*, 33 S.C.L. REV. 78 (1981).

43. Baker v. Baker, _ S.C. _, _, 279 S.E.2d 601, 602 (1981).

44. Colorado adopted Florida's special equity doctrine (see notes 47-49 and accompanying text *infra*) in Shapiro v. Shapiro, 115 Colo. 505, 176 P.2d 363 (1947), to support an award of property to a wife who had performed services, "which contributed to [the husband's] business advantage," and which the court described as services "in addition to the usual household duties." *Id.* at 508, 176 P.2d at 365. Since *Shapiro*, the Colorado legislature has statutorily mandated equitable distribution of property upon divorce. The Colorado statute provides in pertinent part that "[i]n a proceeding for dissolution of a marriage . . . , the court shall . . . divide the marital property, without regard to marital misconduct, in such proportion as the court deems just after considering all relevant factors . . . ." COLO. REV. STAT. § 14-10-113(1)(1973 & Supp. 1980).

Illinois courts have used the term special equity in connection with statutorily sanctioned transfers of property to a non-owning spouse and have interpreted this equity to

Court's exclusive reliance on Florida special equity decisions[45] strongly suggests a close relationship between applications of the doctrine by the South Carolina and Florida courts. An examination of the Florida approach thus offers insight into this doctrine of marital property allocation.

A housewife's special equity in her husband's property was first recognized by the Florida Supreme Court in a ruling that a wife was entitled to a reasonable allowance for maintenance and support despite the grant of a divorce to her husband on the ground of her extreme cruelty, which barred an award of alimony. The court justified this result by recognizing her generous "contribut[ion] in funds and . . . her personal exertion and industry through a long period of time [in] the acquisition and development of [her husband's] home and other property and the establishment of his fortune."[46] The court has since applied the doctrine to recognize an equitable interest of one spouse in property owned by the other, and it has become clear that special equity arises only from the contribution of funds or services beyond the performance of "ordinary marital duties."[47] Re-

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arise only from the contribution of money or services other than those normally performed in the marriage relation. *See, e.g.*, Everett v. Everett, 25 Ill. 2d 342, 185 N.E.2d 201 (1962); Musgrave v. Musgrave, 38 Ill. App. 3d 532, 347 N.E.2d 831 (1976); Overton v. Overton, 6 Ill. App. 3d 1086, 287 N.E.2d 47 (1972). These decisions applied earlier codifications of ILL. REV. STAT. ch. 40, § 18 (1975) (repealed 1977), which provided: "Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable." Because the statute directed "conveyance" of the subject property at divorce, the Illinois special equity doctrine differed from special equity in Florida and South Carolina, where the courts have written that the interest vests at some time during the marriage. *See* Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932); Simmons v. Simmons, 275 S.C. 41, 267 S.E.2d 427 (1980).

The Illinois legislature recently enacted a complete revision of its divorce law patterned after the UNIFORM MARRIAGE AND DIVORCE ACT, which provides for equitable distribution of property and "replaces the common law title doctrine, as modified by the special equities . . . principle . . . ." ILL. STAT. ANN. ch. 40, ¶ 503 (Smith-Hurd 1980). The Historical and Practice Notes go on to explain that "[t]he concept of special equities is not retained in the [new] Act." *Id.* at 456.

45. *See* Baker v. Baker, _ S.C. _, _, 279 S.E.2d 601, 602 (1981)(citing Arrington v. Arrington, 150 So. 2d 473 (Fla. Dist. Ct. App. 1963)); Simmons v. Simmons, 275 S.C. 41, 267 S.E.2d 427 (1980)(citing Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932)).

46. Carlton v. Carlton, 78 Fla. 252, 254, 83 So. 87, 88 (1919).

47. *E.g.*, Eakin v. Eakin, 99 So. 2d 854 (Fla. 1958); Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932); Arrington v. Arrington, 150 So. 2d 473 (Fla. Dist. Ct. App. 1963), *cert. denied*, 155 So. 2d 615 (Fla. 1963). Florida courts take a broad view of "ordinary

cently, the Florida Supreme Court offered the following explanation of the special equity doctrine:

> The term 'special equity' was judicially created to avoid the harshness of the statutory rule that absolutely prohibited alimony for an adulterous wife. In its true sense, a 'special equity' is a vested interest which a spouse acquires because of contribution of funds, property or services made over and above the performance of normal marital duties.
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> When a court finds a true 'special equity,' it should indicate that the party has a vested interest in the subject property. The award, once made, is permanent and not subject to modification.[48]

Although the special equity doctrines applied in Florida and South Carolina are similar, they are not identical. In both jurisdictions, one spouse's special equity interest in property owned by the other spouse arises only when he or she has made a material contribution to the acquisition of that property.[49] Application of the doctrine differs, however, in the manner by which courts in the two states determine whether a special equity claimant has made a material contribution. Florida refuses to recognize the performance of "ordinary marital duties" as a material contribution to the acquisition of property for purposes of special equity[50] and has established broad boundaries for the

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marital duties" and have indicated that the following activities fall within that category: child-rearing responsibilities, Duncan v. Duncan, 379 So. 2d 949 (Fla. 1980); furnishing all living expenses, furnishing the marital home, and serving as a practical nurse during a spouse's lengthy recovery from an accident. *Arrington*, 150 So. 2d at 476-77. The court stated in *Arrington* that "[t]hese are commendable acts on the part of a wife but not compensable by an equitable interest in the husband's estate." *Id.* at 477.

48. Duncan v. Duncan, 379 So. 2d 949, 952 (Fla. 1980) (citations omitted).

49. See notes 32 & 38 and accompanying text *supra*.

50. In the landmark decision of Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), the Florida Supreme Court adopted the theory of equitable distribution while retaining the special equity doctrine, quoting the following language from a decision by a Florida court of appeals:

> The evolution of the law of alimony that we have reviewed in length shows that today the contributions of each party to the accumulation of material assets must be considered in dissolving the marital partnership. Either spouse may contribute either by working in the market place or by working as a homemaker. The fact that in one marital venture a spouse is gainfully employed in the market place and pays a housekeeper to rear the children and keep house is not distinguishable from the spouse who devotes his or her full time to the profession of homemaker. The primary factual circumstance is each

duties it will consider as ordinary.[51] As a result, Florida courts effectively confine the scope of activities on which a special equity award may be predicated to a contribution of funds for the acquisition of the subject property and a contribution of services in the spouse's business.[52] This narrow application of the doctrine apparently was instrumental in bringing about the Florida Supreme Court's endorsement in 1980 of a form of equitable distribution accomplished by the award of lump-sum alimony.[53]

> spouse's contribution to the marital partnership. In the case sub judice, the wife has been shortchanged. The wife has not been adequately compensated for the contribution that she made as a fulltime mother and homemaker to the equal partnership marriage.

Id. at 1203-04 (quoting Brown v. Brown, 300 So. 2d 719, 726 (Fla. Dist. Ct. App. 1974)). The Florida Supreme Court then noted with approval that the policy of the district court of appeals "was not grounded upon principles of community property, but on basic fairness; a dissolution award should be sufficient to compensate the wife for her contribution to the marriage," *id.* at 1204, and stated,

> We recognize that a trial court need not equalize the financial position of the parties. However, a trial judge must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances, one spouse should not be "shortchanged."

Id. (citing *Brown*, 300 So. 2d at 726).

The Florida Supreme Court's reliance in *Canakaris* on lump sum alimony to achieve equitable distribution, 382 So. 2d at 1200-01, is necessitated by Florida's lack of a statute giving courts jurisdiction over property. See note 53 *infra*. The significance of the Florida decisions cited is not the device used to achieve equitable distribution but the nature of the end to be achieved: a fair distribution of marital property. As a Florida district court of appeals subsequently noted, the Florida Supreme Court in *Canakaris* and Duncan v. Duncan, 379 So. 2d 949 (1980),

> marked the dawn of a new era for a Florida wife who has labored beside her husband in achieving material goals. It is no longer necessary for a wife to prove, upon dissolution of the marriage, that her efforts directly and specifically produced a tangible, measurable profit or gain. *Canakaris* confirms the fact that marriage may indeed be a partnership in the economic area and that each partner is entitled to a fair share of the fruits of their combined industry, whether performed in the office, the factory, the fields or the home.

Neff v. Neff, 386 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980).

51. See note 47 *supra*.

52. *See, e.g.*, Duncan v. Duncan, 379 So. 2d 949 (Fla. 1980); Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932); Bird v. Bird, 385 So. 2d 1090 (Fla. Dist. Ct. App. 1980); Rozzano v. Rozzano, 307 So. 2d 894 (Fla. Dist. Ct. App. 1975); Arrington v. Arrington, 150 So. 2d 473 (Fla. Dist. Ct. App. 1963).

53. Florida courts, unlike South Carolina courts, have no express statutory authority to determine the property rights of divorcing parties. *Compare* FLA. STAT. ANN. § 61.10 (1976) (conferring jurisdiction on courts to adjudicate maintenance and financial obligations) *with* S.C. CODE ANN. § 14-21-1020 (Supp. 1980)(conferring jurisdiction to settle the parties' legal and equitable rights in the property of the marriage). Thus, when dividing "the material wealth of the marriage which is being dissolved," *Canakaris*, 382 So. 2d

In contrast, the South Carolina Supreme Court has indicated its willingness to consider a broader range of activities when determining whether a special equity claimant has made a material contribution to property acquired by his or her spouse. In addition to recognizing those activities accepted by the Florida courts,[54] the South Carolina Supreme Court has called attention to contributions to a savings account belonging to the other spouse individually,[55] use of separate income for household expenses,[56] efforts in rearing children,[57] general attendance to household duties,[58] and devotion to the other spouse.[59] Although the court has not indicated that any one of these considerations alone is sufficient to establish a material contribution, the court's willingness to identify these activities[60] before concluding whether or not a material contribution has been made may serve to distinguish South Carolina's special equity doctrine from its Florida counterpart. The court's deliberations may, however, only indicate that the court has not yet firmly settled on its approach to property and the marriage relationship since, as will

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at 1203 (quoting Brown v. Brown, 300 So. 2d 719 (Fla. Dist. Ct. App. 1974)), Florida courts have proceeded under the theories of "lump sum alimony," 382 So. 2d at 1200, and "permanent periodic alimony," 382 So. 2d at 1201-02. The Florida Supreme Court's emphasis on "basic fairness" in the division of marital property indicates that its purpose is the same as that of the South Carolina courts when they apply the doctrine of equitable distribution, notwithstanding the use of alimony theories in Florida.

54. In the determination of material contribution, the South Carolina Supreme Court has recognized a spouse's contribution of funds for the purchase of a business, Poniatowski v. Poniatowski, 275 S.C. 11, 266 S.E.2d 787 (1980), and a spouse's contribution of services in the other spouse's business, 275 S.C. at 13, 266 S.E.2d at 788; Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979), Brief of Respondent at 12, 13; Wilson v. Wilson, 270 S.C. 216, 222, 241 S.E.2d 566, 569 (1978).

55. Baker v. Baker, _ S.C. _, _, 279 S.E.2d 601, 602 (1981).

56. *Simmons*, 275 S.C. at 43 n.1, 267 S.E.2d at 428 n.1; *Wilson*, 270 S.C. at 222, 241 S.E.2d at 569.

57. *Simmons*, 275 S.C. at 43 n.1, 267 S.E.2d at 428 n.1.

58. *Baker*, _ S.C. at _, 279 S.E.2d at 602.

59. *Id.* at _, 279 S.E.2d at 602.

60. Not only has the South Carolina Supreme Court recognized as material contributions a number of activities excluded by the Florida courts, but it has also suggested that duties which might otherwise be characterized as ordinary can take on "increased significance" under special circumstances. *Baker*, _ S.C. at _, 279 S.E.2d at 602. Thus, spousal duties performed at a time when the couple's need is greater may contribute materially to the marriage, *id.* at _, 279 S.E.2d at 602, and it may be possible to argue for the increased significance of any spousal duties that exceed the bounds of those performed in the typical marriage. *See also* Mann v. Commissioner, 74 T.C. 1249, 1262 n.6 (1980).

be seen, many of the foregoing criteria are considered by the courts of other states when making equitable distribution determinations.[61] Finally, because the narrowness of the Florida special equity doctrine apparently gave impetus to that state's endorsement of equitable distribution, South Carolina's more flexible approach to special equity may limit the need for equitable distribution in this state.

B. Equitable Distribution

Five years before the state legislature enacted statutory authorization for family courts to settle all legal and equitable property rights of divorcing parties upon request by either party in the pleadings,[62] the South Carolina Supreme Court ruled that the parties to a divorce action could voluntarily confer jurisdiction upon the family court to determine their respective property rights.[63] In this decision, the supreme court affirmed the family court's "approximately equal division between the parties of their total combined holdings."[64] In 1980, one year after the enactment of the statute authorizing family courts to settle all legal and equitable rights upon request in the pleadings, the court affirmed an equitable distribution of marital property and again noted that the family court had jurisdiction to determine property rights because it had been voluntarily conferred by the parties.[65] These and other South Carolina decisions, expressly or tacitly affirming equitable distribution of marital property, present two issues that warrant careful examination.

1. Jurisdiction of the Family Courts to Effect Equitable Distribution.—In 1974, when the supreme court first upheld equitable distribution, South Carolina's family courts had no statutory authorization to determine the rights of divorcing parties with respect to real property.[66] Consequently, the family court's authority to effect an equitable distribution of property de-

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61. See notes 83-86 and accompanying text *infra*.

62. See note 27 and accompanying text *supra*.

63. Moyle v. Moyle, 262 S.C. 308, 204 S.E.2d 46 (1974) (citing Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961)).

64. 262 S.C. at 312, 204 S.E.2d at 48.

65. Stone v. Stone, 274 S.C. 571, 266 S.E.2d 70 (1980).

66. Family court jurisdiction was limited to dividing the personal property of the divorcing parties. 1968 S.C. Acts 2718, No. 1195 art. IV, § 34(4). See notes 24, 27 & 28 and accompanying text *supra*.

pended upon the voluntary request of the parties.[67] By 1980, however, after the enactment of the family court jurisdiction statute, the supreme court's observation on voluntary conferral of jurisdiction was no longer necessary.[68] Recently, the court noted in dictum that "the General Assembly adopted the doctrine of equitable distribution by statute,"[69] and it is now virtually certain that family courts have jurisdiction to effect an equitable distribution upon request by either party in the pleadings.[70] Thus, although the supreme court has recently favored the special equity doctrine as a vehicle by which to determine the equitable rights of divorcing parties in marital property,[71] equitable distribution should nevertheless be available upon request by either party in the pleadings.[72]

2. Guidelines for Effecting Equitable Distribution.—The South Carolina Supreme Court's equitable distribution decisions

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67. *Piana,* 239 S.C. 367, 123 S.E.2d 297.

68. *See* 274 S.C. at 572-73, 266 S.E.2d at 71.

69. Glass v. Glass, No. 21543 n.1 (S.C., filed Aug. 6, 1981)(citing S.C. CODE ANN. § 14-21-1020 (Supp. 1980)).

70. The dictum in *Glass, id.,* has a sound basis in earlier South Carolina decisions. The supreme court recognized in a special equity decision that the immediate predecessor of section 14-21-1020 of the South Carolina Code, 1976 S.C. Acts 1859, No. 690, art. III, § 2 (amended by 1979 S.C. Acts 118, No. 71, § 4A), "empower[ed] the family court to determine 'all legal and equitable rights' of the parties in a divorce action 'in and to the real and personal property of the marriage . . . .'" *Poniatowski,* 275 S.C. at 13, 266 S.E.2d at 788. Because equitable distribution unquestionably constitutes a determination of divorcing parties' equitable rights in marital property, the statute clearly seems to confer jurisdiction on the family courts to make that determination upon request by either party in the pleadings. *See* S.C. CODE ANN. § 14-21-1020 (Supp. 1980). See note 27 and accompanying text *supra.*

71. For a discussion of "marital property," see notes 90-105 and accompanying text *infra.*

72. The South Carolina Supreme Court requires family courts to review voluntary property settlement agreements for fairness. Drawdy v. Drawdy, _ S.C. _, 268 S.E.2d 30 (1980); McKinney v. McKinney, _ S.C. _, 261 S.E.2d 526 (1980); Fischl v. Fischl, 272 S.C. 297, 251 S.E.2d 743 (1979). Family courts can make a determination of fairness only after consideration of all surrounding facts and circumstances including the parties' respective economic circumstances. _ S.C. at _, 268 S.E.2d at 30-31; _ S.C. at _, 261 S.E.2d at 527. *See Domestic Relations, supra* note 42, at 89-91. Although the supreme court has not identified the source of the family courts' duty to review property settlement agreements, that authority would appear to derive from the jurisdictional statute. See note 27 *supra.* The family courts' authority to reject an unfair property settlement agreement and, in effect, require the parties to modify the disposition of property specified in an unfair agreement is interrelated with the family courts' power to effect an equitable distribution of marital property when the parties have not reached a property settlement agreement.

contain four elements essential in effectuating the distribution of property. First, a court must determine whether both parties have made a material contribution to the acquisition of property and identify the proportionate contributions of each party. Second, a court must identify the specific real and personal property that may be apportioned between the parties. Third, a court must consider the value of nonliquid property. Finally, a court must decide on the manner in which to distribute the property. These elements are similar to those that must be examined when a special equity issue is raised; the principal distinction is the measure of the contribution.

a. Criteria upon which to base the amount distributed.—The most important criterion considered by courts when effecting an equitable distribution is the material contribution of the respective divorcing parties. The South Carolina Supreme Court has indicated that material contribution to the acquisition of property may be either direct or indirect.[73] Direct contribution occurs when one spouse furnishes funds used to purchase property[74] and can form the basis on which to predicate equitable distribution of property,[75] a special equity award,[76] or a resulting trust.[77] Indirect contribution, which is less susceptible of precise quantification than direct contribution, arises from activities of the spouse that have somehow "contribute[d] to the material success of the family."[78] Although the South Carolina Supreme Court has considered indirect contributions together with direct contributions when making special equity awards,[79] it has indicated that indirect contributions are sufficient alone to justify equitable distribution of marital property.[80] The court's will-

73. *See, e.g., Moyle*, 262 S.C. at 310-11, 204 S.E.2d at 47.

74. *See* Jeffords v. Hall, _ S.C. _, _, 277 S.E.2d 703, 704 (1981); *Moyle*, 262 S.C. at 310-11, 204 S.E.2d at 47.

75. *See Moyle*, 262 S.C. at 310-11, 204 S.E.2d at 47.

76. See notes 44-48 and accompanying text *supra*.

77. See note 22 and accompanying text *supra*.

78. *Moyle*, 262 S.C. at 311, 204 S.E.2d at 47.

79. See notes 54-59 and accompanying text *supra*.

80. Affirming the family court's equitable distribution of marital property in *Moyle*, the supreme court stated:

> It is conceded by the wife that she did not furnish directly any part of the purchase price of any of the real property acquired by the parties either jointly or separately. The record, however, leaves no doubt that the wife *indirectly* contributed to the financial success of, and the acquisition of property by the husband.

ingness to effect an equitable distribution on the basis of a spouse's indirect contribution is consistent with results reached in a substantial and still growing number of common-law property jurisdictions.[81]

Statutes and decisions in other states have established specific criteria to guide courts in the exercise of their discretion to distribute marital property. Widely accepted considerations include the age, health, and physical condition of the parties,[82] their station in life,[83] future earning capacities,[84] and contributions to the acquisition of marital property.[85] At least one court has expressly considered interruption of a spouse's personal career or education,[86] and another court has recognized a spouse's lost employment opportunities as an element the court should consider when making an equitable distribution of marital property.[87] Finally, although the Uniform Marriage and Divorce Act expressly excludes consideration of misconduct or fault,[88] a

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262 S.C. at 310-11, 204 S.E.2d at 47 (emphasis added).

81. *See* Freed & Foster, *Divorce in the Fifty States—An Overview as of 1978*, 13 FAM. L.Q. 105, 114 (1979). For a current listing of states in which courts effect equitable distribution of marital property, see note 4 *supra*.

82. *See, e.g.*, Wicks v. Wicks, 379 So. 2d 612 (Ala. Civ. App. 1980); Bosma v. Bosma, 287 N.W.2d 447 (N.D. 1979); ILL. ANN. STAT. ch. 40, ¶ 503(c)(7)(Smith-Hurd 1980). *See generally* UNIFORM MARRIAGE AND DIVORCE ACT § 307, *reprinted in* 9A UNIFORM LAWS ANN. 142 (1979).

83. *See, e.g.*, Wicks v. Wicks, 379 So. 2d 612 (Ala. Civ. App. 1980); Bosma v. Bosma, 287 N.W.2d 447 (N.D. 1979). *See generally* UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 82, at 142.

84. *See, e.g.*, Colucci v. Colucci, 392 So. 2d 577 (Fla. Dist. Ct. App. 1980); *In re* Marriage of Amato, 80 Ill. App. 3d 395, 399 N.E.2d 1018 (1980); Heilman v. Heilman, 95 Mich. App. 728, 291 N.W.2d 183 (1980); Michael v. Michael, 287 N.W.2d 98 (S.D. 1980). *See generally* UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 82, at 142.

85. *See, e.g.*, Matlock v. Matlock, 205 Neb. 357, 287 N.W.2d 690 (1980); COLO. REV. STAT. § 14-10-113(1)(a)(Supp. 1980); ILL. ANN. STAT. ch. 40, ¶ 503(c)(1)(Smith-Hurd 1980). *See generally* UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 82, at 142.

86. Matlock v. Matlock, 205 Neb. 357, 359, 287 N.W.2d 690, 691 (1980).

87. *In re* Marriage of Browning, 28 Or. App. 563, 559 P.2d 1314 (1977). The South Carolina Supreme Court, affirming an alimony award, has expressly considered a wife's forfeiture upon marriage of income that she had been receiving as the widow of a deceased veteran. Miller v. Miller, 225 S.C. 274, 283, 82 S.E.2d 119, 123 (1954).

88. UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 82, at 142. The Act lists the following criteria for courts to consider when effecting apportionments of marital property:

> the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in

number of jurisdictions, including South Carolina, take into account the conduct of the parties in bringing about the divorce.[89]

b. Identification of the property that may be divided.—Section 14-21-1020 of the South Carolina Code authorizes family courts in certain circumstances to determine divorcing parties' rights in the "property of the marriage,"[90] and the South Carolina Supreme Court, in effecting equitable distributions, has used the term "marital property,"[91] which is implicitly distinct from the separate property of divorcing parties.[92] Although at least two community property jurisdictions permit upon divorce the distribution of all property, whether marital or separate,[93] most states distribute only marital property.[94] The

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> lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

Id.

89. *E.g.*, Cooper v. Cooper, 382 So. 2d 569, 571 (Ala. Civ. App. 1980); Taylor v. Taylor, 378 So. 2d 1352, 1353 (Fla. Dist. Ct. App. 1980). *Cf.* Simmons v. Simmons, 275 S.C. 41, 267 S.E.2d 427 (1980)(court may take adultery into account when determining amount of special equity award). In *Simmons*, the South Carolina Supreme Court explained that

> [i]n making a division or distribution of property on granting a divorce, the court may consider the cause for which the divorce was granted and who was at fault, and, ordinarily, the circumstance of fault has persuasive force, but is not of itself controlling, and does not justify the imposition of a severe penalty in the way of deprivation of property.

275 S.C. at 44-45, 267 S.E.2d at 429 (quoting 27B C.J.S. *Divorce* § 295(7)(1950)).

90. S.C. CODE ANN. § 14-21-1020 (Supp. 1980). See note 7 and accompanying text *supra*.

91. *E.g.*, *Baker*, _ S.C. at _, 279 S.E.2d at 602; *Poniatowski*, 275 S.C. at 12, 266 S.E.2d at 788; *Stone*, 274 S.C. at 572-73, 266 S.E.2d at 71.

92. The term "separate property" is used in the Married Women's Property Acts, *e.g.*, S.C. CODE ANN. § 20-5-20 (1976), to identify property owned by a married woman at the time of her marriage or acquired thereafter "by gift, grant, inheritance, devise, purchase, or otherwise." S.C. CODE ANN. § 20-5-30 (1976). The concept of separate property is also used in community property states to distinguish property belonging to the spouses individually from the property of the community. *See* I. BAXTER, MARITAL PROPERTY § 6.1 (1973). Although certain property might clearly be characterized as separate property, it may be argued that appreciation in the value of separate property has become marital property subject to division if the fact of the marriage has permitted the owning spouse to avoid consuming or otherwise disposing of the separate property. *See* Mann v. Commissioner, 74 T.C. 1249 (1980).

93. Musselwhite v. Musselwhite, 555 S.W.2d 894 (Tex. Civ. App. 1977); Friedlander v. Friedlander, 80 Wash. 2d 893, 494 P.2d 208 (1972)(requiring distribution of both community property and separate property).

South Carolina Supreme Court, in keeping with section 14-21-1020, has impliedly limited equitable distribution to marital property and has recognized the following types of property as falling within that designation: business interests,[95] the marital home and its furnishings,[96] stocks and a savings account,[97] automobiles, a summer cottage, and life insurance policies.[98] In addition, by reassigning a trial court's allocation of a mortgage obligation,[99] the court implicitly recognized that financial indebtedness may also be divided between the parties at divorce.[100]

Many common-law property states have a decisional history of marital property determinations much more extensive than South Carolina's, and a number of states have enacted statutory definitions of marital property.[101] Nevertheless, difficult questions still arise regarding the nature and divisibility of such assets as business goodwill,[102] retirement and profit-sharing

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94. See note 101 and accompanying text *infra*.

95. *Poniatowski*, 275 S.C. at 12-13, 266 S.E.2d at 788; *Stone*, 274 S.C. at 572-73, 266 S.E.2d at 71; *Moyle*, 262 S.C. at 311, 204 S.E.2d at 47.

96. *Baker*, _ S.C. at _, 279 S.E.2d at 602; *Moyle*, 262 S.C. at 310, 204 S.E.2d at 47.

97. *Baker*, _ S.C. at _, 279 S.E.2d at 602, 603.

98. *Moyle*, 262 S.C. at 310, 204 S.E.2d at 47.

99. *Baker*, _ S.C. at _, 279 S.E.2d at 603.

100. Other courts have equitably distributed financial obligations incurred during marriage. *E.g.*, Creel v. Creel, 378 So. 2d 1251 (Fla. Dist. Ct. App. 1979); Matter of Ayers, 82 Ill. App. 3d 164, 402 N.E.2d 401 (1980); *In re* Marriage of Johnson, 299 N.W.2d 466 (Iowa 1980). *Contra*, Waitsman v. Waitsman, 599 S.W.2d 42 (Mo. Ct. App. 1980).

101. *E.g.*, COLO. REV. STAT. § 14-10-113(2)(Supp. 1980); ILL. ANN. STAT. ch. 40, ¶ 503(a) (Smith-Hurd 1980). These statutes were adapted from the original formulation of the UNIFORM MARRIAGE AND DIVORCE ACT § 307, which provided in pertinent part as follows:

> For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage except:
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> (1) property acquired by gift, bequest, devise, or descent;
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> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (3) property acquired by a spouse after a decree of legal separation;
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> (4) property excluded by valid agreement of the parties; and
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> (5) the increase in value of property acquired before the marriage.

Id., *supra* note 82, at 144.

102. *See, e.g.*, *In re* Marriage of Howard, 42 Colo. App. 457, 600 P.2d 93 (1979); McKelvey v. McKelvey, 585 S.W.2d 544 (Mo. Ct. App. 1979); Grosman, *Identification and Valuation of Assets Subject to Equitable Distribution*, 56 N.D.L. REV. 201, 217 (1980); Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157, 169 (1978); Comment, 7 SW. U.L. REV. 186 (1975).

plans,[103] worker's compensation and personal injury awards,[104] and a college or professional education.[105]

c. Valuation of property.—The South Carolina Supreme Court has accepted valuations of real and personal property made by professional appraisers[106] and valuations of business interests derived from federal income tax returns.[107] One commentator has suggested that deriving the value of business assets from federal tax returns is unsatisfactory because tax returns rely on book values, which often understate the true value of a business interest.[108] Indeed, in the context of determining the fair value of a corporation following a stockholder's dissent to merger, the South Carolina Supreme Court has ruled that "the trial court must undertake to compute the fair value by establishing 'the fair market value of the corporate property as an established and going business.' "[109] This is to be accomplished by considering the business' net asset value, the fair market value for its stock, and earnings or investment value.[110] The court should be equally receptive to these criteria when valuing business interests for purposes of equitable distribution.

d. Manner of distribution.—The South Carolina Supreme Court has recognized that "any reasonable means may be em-

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103. *See, e.g.*, Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979); Foster v. Foster, 589 S.W.2d 223 (Ky. 1979); Tigner v. Tigner, 90 Mich. App. 787, 282 N.W.2d 481 (1979); McLaughlin v. McLaughlin, 585 S.W.2d 567 (Mo. Ct. App. 1979); Witcig v. Witcig, 206 Neb. 307, 292 N.W.2d 788 (1980); Grosman, *supra* note 102, at 216-17; Krauskopf, *supra* note 102, at 171-76.

104. Gan v. Gan, 83 Ill. App. 3d 265, 404 N.E.2d 306 (1980); Lucas v. Lucas, 83 Ill. App. 3d 606, 404 N.E.2d 545 (1980); Heilman v. Heilman, 95 Mich. App. 728, 291 N.W.2d 183 (1980); Fries v. Fries, 288 N.W.2d 77 (N.D. 1980); Grosman, *supra* note 102, at 217-18.

Recently, in McCarty v. McCarty, 101 S. Ct. 2728 (1981), the United States Supreme Court ruled that military retirement pay is a personal benefit and may not be divided between divorcing spouses under a community property statute. For a further discussion of *McCarty*, see note 176 *infra*.

105. *See, e.g., In re* Marriage of Nichols, __ Colo. App. __, 606 P.2d 1314 (1979); *In re* Marriage of Horstmann, 63 N.W.2d 885 (Iowa 1978). *See* Krauskopf, *supra* note 102, at 166-68; *Recent Developments*, 45 ALB. L. REV. 483, 495-99 (1981); 1 EQUITABLE DISTRIBUTION REP. 2-4 (Jan. 1981).

106. *Moyle*, 262 S.C. at 310, 204 S.E.2d at 46.

107. *Stone*, 274 S.C. at 572 n.1, 266 S.E.2d at 71 n.1.

108. Krauskopf, *supra* note 102, at 163-66.

109. Santee Oil Co. v. Cox, 265 S.C. 270, 217 S.E.2d 789 (1975). *See* Metromont Materials Corp. v. Pennell, 270 S.C. 9, 239 S.E.2d 753 (1977).

110. 265 S.C. 274, 217 S.E.2d at 791. *See* 270 S.C. at 19, 239 S.E.2d at 758.

ployed by the courts to effectuate division of the spouses' property."[111] Moreover, the supreme court has adopted the following statement of the scope of the family courts' authority to divide marital property:

> [I]f the divorce court is authorized or required to make a division of property or to recognize one spouse's title or equitable rights in property held by the other, the court need not actually divide the property between the parties but may award the property to one spouse and order that the spouse pay the other a sum in cash especially where a division and transfer in kind is impractical or does not bring about a fair and equitable result.[112]

Notably, "a court may not unconditionally order the transfer of property as alimony or in lieu thereof."[113]

Beyond these general guidelines, the South Carolina Supreme Court has not expressly outlined the methods available to the family courts for accomplishing the distributions they deem appropriate, and the scope of the courts' statutory authority thus remains subject to interpretation. The narrow view would limit the power of the family courts to the remedy provisions expressly set forth in the Family Court Act[114] on the theory that these provisions are exclusive rather than illustrative. The broader view suggests that, once having properly acquired jurisdiction over the subject matter of property distribution, the family courts have power to effect any remedy within the jurisdiction of the circuit courts.[115] Under this theory, the family

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111. Taylor v. Taylor, 267 S.C. 530, 535, 229 S.E.2d 852, 854 (1976)(citing 27B C.J.S. *Divorce* § 292(1)(1959)). *See Stone,* 274 S.C. at 572, 266 S.E.2d at 71; Matheson v. McCormac, 186 S.C. 93, 102, 195 S.E. 122, 126 (1938).

112. *Moyle,* 262 S.C. at 313, 204 S.E.2d at 48 (quoting 24 AM. JUR.2D *Divorce and Separation* § 934 (1966).

113. *Poniatowski,* 275 S.C. at 12, 266 S.E.2d at 788 (citing McCullough v. McCullough, 271 S.C. 475, 248 S.E.2d 308 (1978); Wilson v. Wilson, 270 S.C. 216, 241 S.E.2d 566 (1978); Smith v. Smith, 264 S.C. 624, 216 S.E.2d 541 (1975)).

114. S.C. CODE ANN. § 14-21-810 (1976 & Supp. 1980). Although this view is contradicted by other specific statutory provisions, see note 115 *infra,* it gains some support from the maxim of statutory interpretation, *"expressio unius est exclusio alterius"* or "the expression of one thing is the exclusion of another." *See* BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

115. *Cf.* S.C. CODE ANN. § 14-21-810(b)(17) (1976 & Supp. 1980)(giving family courts power "[t]o make any order necessary to carry out and enforce the provisions of this chapter . . . ."); *id.* § 14-21-1020 (Supp. 1980)(giving family courts "all power, authority and jurisdiction by law vested in the circuit courts of the State . . . ."). *Cf.* Gardner v.

courts would appear to have authority to order such remedies as judicial sales of property[116] and the contempt sanction.[117] Before the enactment of the statute giving family courts jurisdiction to divide the property of divorcing parties, the supreme court rejected a contention by a family court judge that he "had no productive remedy to enforce child support payments."[118] The court cited several statutory provisions to support its finding that adequate remedies were available.[119] Because section 14-21-1020 has since expanded the family courts' jurisdiction, it seems likely that the court would subscribe to the broader view of available remedies. When implementing these remedies, the family courts must observe the requirements of due process[120] and any prescribed statutory procedures.[121]

C. Measuring the Parties' Material Contributions

Material contribution under South Carolina's special equity doctrine apparently must be predicated on a spouse's direct contribution to the acquisition of marital property although the supreme court has considered indirect contribution as additional evidence when determining the amount of the special equity award.[122] The court has expressly stated that, when arriving at a special equity award, family courts should weigh the relative incomes and material contributions of the parties.[123] By contrast, material contribution for the purpose of equitable distribution apparently requires only evidence of a spouse's indirect contribution,[124] and the supreme court has affirmed equitable distribu-

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Gardner, 253 S.C. 296, 300-01, 170 S.E.2d 372, 374 (1969)(family court has authority to make such orders touching maintenance and alimony as are just); Matheson v. McCormac, 186 S.C. 93, 100, 195 S.E. 122, 126 (1938)("[I]n this state, there is certainly no limitation on the power of the Courts to settle and decree the rights of litigants, save as prohibited by the fundamental law.")(citation omitted).

116. *Id.* §§ 15-39-610 to -900 (1976 & Supp. 1980).

117. *See, e.g.*, Bigham v. Bigham, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975).

118. Reddick v. Reddick, 266 S.C. 241, 222 S.E.2d 758 (1976).

119. *Id.* at 243-44, 222 S.E.2d at 759.

120. *See* Bank Repossessions v. Mobile America Corp., 268 S.C. 622, 626, 235 S.E.2d 709, 711 (1977).

121. *See, e.g.*, S.C. CODE ANN. §§ 15-55-10 to -100 (1976)(injunctions); §§ 15-65-10 to -130 (1976)(receivership and other provisional remedies).

122. See notes 154-59 and accompanying text *infra*.

123. *Simmons*, 275 S.C. at 45, 267 S.E.2d at 429.

124. See note 80 and accompanying text *supra*.

tions effected by the family courts upon consideration of the relative contributions of the parties.[125]

Before the parties' relative incomes and contributions can be weighed, however, they must be identified and valued. This is accomplished by determining the value of the spouses' direct and indirect contributions at the time they were made and the amount of any income foregone by either spouse because of the marriage.[126] Once the value of these contributions has been determined, their present value must be calculated.[127]

1. Direct Contribution.—Direct contributions include all funds and property brought into the marriage by the parties and property inherited jointly by the parties during the marriage.[128] Although the amount of funds directly contributed can usually be ascertained from relevant financial records, the valuation of nonmonetary assets may be more difficult. As noted earlier, the South Carolina Supreme Court has accepted expert appraisals of marital property subject to equitable distribution[129] and can therefore be expected to accept similar appraisals of the value of property contributed by the parties such as automobiles or furniture, even if the parties no longer own the specific property. The most common and quite often the largest direct contribution will be the parties' earnings from employment. All income, including wages, salaries, interest, and dividends[130] can be obtained from the parties' tax returns, bank statements, employers' records, and other sources.[131] When determining direct contributions no allowance is made for consumption of goods or services by the contributors or by other household members,[132]

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125. *E.g., Jeffords,* _ S.C. at _, 277 S.E.2d at 704; *Moyle,* 262 S.C. at 310-11, 204 S.E.2d at 47.

126. See text accompanying notes 150-52 *infra.*

127. For a discussion of present value, see notes 153-55 and accompanying text *infra.*

128. *See Jeffords,* _ S.C. at _, 277 S.E.2d at 704; *Moyle,* 262 S.C. at 310-11, 204 S.E.2d at 47.

129. See note 106 and accompanying text *supra.*

130. *See* 26 U.S.C. § 61 (1976).

131. In circumstances that suggest the possibility of concealed funds, more extensive discovery may prove useful.

132. The purpose of the analysis is not to trace the consumption of the contributions to arrive at a net amount provided to the remainder of the family. Rather, the intent is to determine the total amount available for consumption, however the family may decide to consume it. Consumption is based upon decisions made after the contributions are made available and should be viewed as a decision made by the family as a

and all calculations should be made on a before-tax basis.[133]

2. Indirect Contribution.—Indirect contribution, as generally defined, includes services performed for the benefit of the family for which no income is received, on the assumption that these services are required by the family and would be purchased outside the home if not provided internally.[134] Although it has been observed that both spouses may be the source of valuable indirect contributions,[135] the leading indirect contribution issue concerns the valuation of homemakers' services.[136] Courts in at least twenty-two states now consider homemakers' services when making an equitable distribution of property,[137] and a number of states statutorily require the consideration of homemakers' services.[138] Given that indirect contribution should be measured, three principal methods for doing so are in current use.

a. The Opportunity Cost Method.—This method computes household production of goods and services by multiplying a spouse's last or marginal wage rate by the number of hours devoted to home production.[139] If the party is presently employed

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unit.

133. Direct contributions are valued on a before-tax basis for several reasons. First, determining the appropriate tax bracket for the spouses separately would require a judgment about whether the income of a particular spouse was earned first or at the margin. Second, if one party owned a tax shelter that exceeded the income provided by both spouses on a joint return, any attempt to determine a separate tax liability would require a consideration of the ownership of certain assets, *i.e.*, of the tax shelter. The intent of the analysis is to determine contributions made to the marriage by a spouse; the tax liability of the spouses may be only partially related to the contribution.

134. *Cf. Moyle*, 262 S.C. at 311, 204 S.E.2d at 47 (housewife's services contributed to material success of family). Nonmarket services require consumption of family resources that theoretically would otherwise be available for the acquisition of other goods and services, yet the family chooses to expend these resources on nonmarket services. It must be assumed that a family makes rational decisions to allocate its resources for the acquisition of the goods and services that it desires—its limited resources requiring the selection of some at the cost of eliminating others.

135. Hauserman & Fethke, *Valuation of a Homemaker's Services*, 22 TRIAL LAW. GUIDE, 248, 249 n.1 (1978).

136. *See, e.g.*, Bender, *How Much is a Housewife Worth?*, MCCALL'S, May 1974, at 56; Grosman & Casey, *Valuation of a Homemaker's Services*, 1 EQUITABLE DISTRIBUTION REP. 9 (Jan. 1981); Hauserman & Fethke, *supra* note 135.

137. Freed & Foster, *supra* note 81, at 114.

138. *E.g.*, COLO. REV. STAT. § 14-10-113(1)(a) (Supp. 1980); ILL. ANN. STAT. ch. 40, ¶ 503(c)(1) (Smith-Hurd 1980). *See* UNIFORM MARRIAGE AND DIVORCE ACT § 307, *reprinted in* 9A UNIFORM LAWS ANN. 142-43 (1979).

139. For a more extensive discussion of the Opportunity Cost Method, see Kiker,

on a full or part-time basis, the wage received provides a measure of the value of his or her services. A spouse who is not currently employed may have an employment history from which an appropriate wage rate can be ascertained. For an individual who has not been employed, calculations must be based on the type of work the individual might do. Consideration of the individual's age and qualifications, as well as the employment opportunities available[140] and the worth of that employment in the market place, should condition these calculations.

The Opportunity Cost Method for valuing indirect contribution has notable weaknesses. First, it is unreasonable to apply a single wage rate to a variety of household functions that require vastly different levels of skill and would command different wage rates if purchased in the marketplace.[141] Second, establishing an appropriate wage rate or opportunity cost for an unemployed spouse may be quite speculative. Finally, application of a professional's wage rate or opportunity cost, which might be extravagant, may distort the theoretical market value of the services a professional performs within a marriage.

b. Replacement Cost by Function Method.—This method values household production of goods and services by identifying the various functions performed, measuring the time allotted to each task, and multiplying the time spent in each task by its market cost.[142] It overcomes the major deficiencies inherent in the Opportunity Cost Method by recognizing that nonmarket work includes tasks with significantly different market costs and by relying on a time allocation element, which has been the subject of extensive empirical investigation.[143]

The most recent and comprehensive time-use studies for households conclude that the major determinants for the

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Evaluating Household Services, 16 TRIAL 34, 34 (Feb. 1980).

140. Hauserman & Fethke, *supra* note 135, at 255.

141. Dishwashing and assisting a child with schoolwork are typical examples of household contributions that vary in level of sophistication and cost if purchased outside the home.

142. Kiker, *supra* note 139, at 34-35.

143. *E.g.*, DORSEY, TIME SPENT IN HOMEMAKING TASKS, HOUSEHOLD MANAGEMENT AND KITCHENS, (President's Council on Home Building and Home Ownership 1932); GIROBU, USE OF TIME FOR HOUSEHOLD ACTIVITIES BY EMPLOYED AND NONEMPLOYED RURAL HOMEMAKERS (Cornell U. 1972); Walker & Gauger, *Time and Its Dollar Value in Household Work*, FAM. ECON. REV. 8 (Fall 1973); Walker, *Time Used by Husbands for Household Work*, FAM. ECON. REV. 8 (June 1970).

amount of time devoted to nonmarket household work are the number of children in the household, the age of the youngest child, and the employment status of the contributor.[144] An unemployed wife may devote as many as seventy hours per week to household tasks while an employed wife may contribute up to fifty-six hours per week to these jobs.[145] A husband's household contribution ordinarily ranges from ten to twenty hours per week depending on the number of hours he is employed.[146] A wife's employment generally has little effect on the amount of time a husband devotes to household tasks.[147]

Time-use data may be employed to determine the value of a housewife's indirect contributions as illustrated in Table I.

TABLE I

VALUE OF INDIRECT CONTRIBUTION PER YEAR FOR EMPLOYED HOUSEWIFE WITH THREE CHILDREN, ONE UNDER ELEVEN YEARS

SERVICES RENDERED	HOURS PER DAY	WAGE*	VALUE PER YEAR
Cooking	1.2	$3.25	$1,423.50
Dishwashing	.6	3.10	678.90
Family care	.2	6.33	462.09
House care	1.5	4.00	2,190.00
Clothing care	1.6	3.10	1,810.40
Marketing	1.3	5.62	2,666.69
Management	1.5	4.20	2,299.50
TOTAL HOURS	7.9		
TOTAL ANNUAL VALUE			$11,531.08

*South Carolina Employment Security Commission

Because the data contained in Table I represent sample averages, the figures may not accurately reflect time allocations in a

144. *See, e.g.*, Sanik, A Twofold Comparison of Time Spent in Household Work in Two-Parent, Two-Child Households: Urban New York State in 1967-68 and 1977; Urban-Rural New York-Oregon in 1977 174 (1979)(unpublished thesis in Cornell University Library)(U. Microfilms Int'l No. 7910832); K. WALKER & E. WOODS, TIME USE: A MEASURE OF HOUSEHOLD PRODUCTION OF FAMILY GOODS AND SERVICES (Center for the Family of the American Home Economics Association 1976).

145. *See* Sanik, *supra* note 144, at 213 app. J.

146. Walker, *supra* note 143, at 8.

147. *Id.*

particular household. Should a spouse's actual hours of household contribution vary from the sample averages, time-use estimates for various household functions can be made after interviews with household members.

Difficulty may also arise in obtaining accurate wage rates. It is possible that the description of a service for which a wage rate is available may not conform to the function actually performed by a spouse, and an average wage rate for several related services may be appropriate. In addition, although current wage rates are available,[148] data for services performed in the past may be less accessible. Estimates must then be made that are consistent over a period of time and accurately reflect the correct wage rates for given points in time. Although the Replacement Cost by Function method may be preferable to the Opportunity Cost method, there may be situations when use of the former will not be practicable.

c. Replacement Cost by Single Housekeeper Method.—This method values household production of goods and services by multiplying the total number of hours spent in household production by the wage rate for domestic workers[149]—usually the legal minimum wage. While the valuation is easily calculated, it ignores the different market wage rates for various household tasks. Nevertheless, for calculations that cover many years and for which reasonably accurate wage rate data by function may not be readily available, use of minimum wage data provides an accurate but conservative valuation of indirect contribution.

3. Income Differential Foregone.—Foregone income can be viewed as contribution to the marriage unit if a spouse, as a result of marriage, has accepted reduced earnings for a job that was being performed or has found it necessary to accept a different position with reduced pay.[150] Foregone income frequently results from geographic wage rate differentials or from lack of suitable employment opportunities upon relocation.[151] Income differential foregone is determined by subtracting an individ-

148. *See* SOUTH CAROLINA EMPLOYMENT SECURITY COMM., SOUTH CAROLINA WAGE AND RATES AND FRINGE BENEFITS (1980).

149. *See* Kiker, *supra* note 139, at 34.

150. *In re* Marriage of Browning, 28 Or. App. 563, 559 P.2d 1314 (1977). *See* Grosman & Casey, *supra* note 136, at 9.

151. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 5 (1980).

ual's actual earnings, if any, from the amount that would have been earned had the individual remained in the position held before marriage.[152]

Table II presents the income differential foregone for a hypothetical case.

TABLE II

INCOME DIFFERENTIAL FOREGONE

YEAR	TOTAL INCOME	POTENTIAL INCOME	INCOME FOREGONE	PRESENT VALUE*
1976	$ 9,972	$10,752	$ 780	$1,043.80
1977	10,500	11,371	871	1,099.64
1978	11,048	12,740	1,692	2,015.17
1979	12,129	13,540	1,411	1,585.40
1980	14,210	15,100	890	943.40
TOTAL INCOME FOREGONE			$5,644	$6,687.41

*Compounded at a hypothetical rate of 6% using a standard compound value table and carried out four places behind the decimal.

4. Calculation of Present Value.—Contributions, whether direct, indirect, or in the nature of foregone income, normally occur at different points throughout the marriage. If contributions to the marriage were liquid funds that had been invested when acquired, their present value would be greater than the original amount. For this reason, contributions to the marriage must be compounded at a reasonable rate in order to determine their present value.[153]

A reasonable rate may be selected pursuant to one of two theories. The first holds that the rate should represent the average return that an investor could earn on relatively low-risk liquid investments. Rates commonly used are based on average yields on passbook savings accounts or average annual daily rates on risk-free investment instruments such as three-month treasury bills.[154] The second theory holds that the discount rate should represent the average annual growth rate in income dur-

152. *See* Grosman & Casey, *supra* note 136, at 12; Kiker, *Divorce Litigation: Valuing the Spouses' Contributions to the Marriage*, 16 TRIAL 48, 48 (Dec. 1980).

153. *See* Hauserman & Fethke, *supra* note 135, at 258.

154. *See id.*

ing the years of the marriage.[155] The objective in both cases is to put historical earnings in their present value. Regardless of which theory is used, accurate valuation of a party's contribution to a marriage requires the use of present value analysis, since the mere addition of various contributions without regard to the timing of cash flows will result in a significant error in determining the total current value of the contributions.

5. Sample Calculations for a Hypothetical Situation.—The following hypothetical, which for simplicity uses a six percent rate, assumes the demise of a five-year marriage during which each spouse was employed and each made statistically average indirect contributions to the marriage. The illustration employs the Replacement Cost by Single Housekeeper method for valuing indirect contribution rather than the Replacement Cost by Function method. Although in theory every attempt should be made to determine accurately the market value of each service performed at the time it was performed, the complexity of the task may render the Replacement Cost by Single Housekeeper method more cost-effective.[156] The wife's direct contributions appear in Table III.

155. *See id.* The same theory that applies to estimating future income growth rates in wrongful death and injury cases applies to rate determination for establishing the present value of past earnings. *Id.* at 256. In *Baker,* the South Carolina Supreme Court appeared to apply this theory by rejecting "a strict mathematical approach comparing the parties' incomes" and considering the disproportionate value of the wife's contribution at a time when the couple's need was greater. *Baker,* _ S.C. at _, 279 S.E.2d at 602.

156. The data and analysis detailed in this section are ordinarily compiled and presented by an expert who must be able to demonstrate special knowledge based on expertise and experience that "bear[s] upon the facts of the case being tried . . . ." Young v. Tide Craft, Inc., 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978). Although data appropriate to determine replacement cost by function might result in a somewhat higher valuation of indirect contribution, the cost of compiling the data might well offset its value. *See generally* Grosman, *The Gold of Coronado,* 1 EQUITABLE DISTRIBUTION REP. 11 (Apr. 1981).

TABLE III

DIRECT CONTRIBUTION OF EMPLOYED HOUSEWIFE

YEAR	SOURCE	AMOUNT	TOTAL	PRESENT VALUE*
1976	Salary	$ 9,672		
	Other Income	300	$ 9,972	$13,344.53
1977	Salary	10,200		
	Other Income	300	10,500	13,256.25
1978	Salary	10,728		
	Other Income	320	11,048	13,158.17
1979	Salary	11,809		
	Other Income	320	12,129	13,628.14
1980	Salary	13,860		
	Other Income	350	14,210	15,062.60
TOTAL EARNINGS			$57,859	
PRESENT VALUE OF DIRECT CONTRIBUTION*				$68,449.69

*Compounded at a rate of 6% using a standard compound value table and carried out four places behind the decimal.

The wife's hypothetical indirect contribution, assuming the accuracy of the estimates present earlier, appears in Table IV.

TABLE IV

INDIRECT CONTRIBUTION OF EMPLOYED HOUSEWIFE

YEAR	HOURS PER WEEK	MINIMUM WAGE	ANNUAL WAGE*	PRESENT VALUE**
1976	38	$2.30	$ 4,544.80	$ 6,081.85
1977	42	2.30	5,023.20	6,341.79
1978	42	2.65	5,787.60	6,893.03
1979	45	2.90	6,786.00	7,624.75
1980	45	3.10	7,254.00	7,689.24
TOTAL			$29,395.60	
PRESENT VALUE OF INDIRECT CONTRIBUTION				$34,630.66

*Based on a 52-week year

**Compounded at a rate of 6% using a standard compound value table and carried out four places behind the decimal.

On the further assumption that the wife in this hypothetical was required to forego income as illustrated in Table II, a summary of her overall economic contribution to the marriage appears in Table V.

TABLE V

SUMMARY OF EMPLOYED WIFE'S ECONOMIC CONTRIBUTION

Indirect Contribution	$29,395.60	
Present Value of Indirect Contribution*		$34,630.66
Direct Contribution	57,859.00	
Present Value of Direct Contribution*		68,449.69
Total Direct and Indirect Contribution	$87,254.60	
Present Value of Total Contribution*		$103,080.35
Income Differential Foregone (from Table II)	5,644.00	
Present Value of Income Differential Foregone*		6,687.41
TOTAL ECONOMIC CONTRIBUTION	$92,898.60	
TOTAL PRESENT VALUE OF ECONOMIC CONTRIBUTION*		$109,767.76

*Compounded at a rate of 6% using a standard compound value table and carried out four places behind the decimal.

The husband's hypothetical direct and indirect contributions are represented in Tables VI and VII.

TABLE VI

DIRECT CONTRIBUTION BY EMPLOYED HUSBAND

YEAR	INCOME	PRESENT VALUE*
1976	$ 40,000	$ 53,528.00
1977	45,000	56,812.50
1978	50,000	59,550.00
1979	53,000	59,550.80
1980	58,000	61,480.00
TOTAL	$246,000	$290,921.30

*Compounded at a rate of 6% using a standard compound value table and carried out four places behind the decimal.

TABLE VII

INDIRECT CONTRIBUTION BY EMPLOYED HUSBAND

YEAR	HOURS PER WEEK	MINIMUM WAGE	ANNUAL WAGE	PRESENT VALUE*
1976	10	$2.30	$1,196	$1,600.49
1977	10	2.30	1,196	1,509.95
1978	10	2.65	1,378	1,641.20
1979	10	2.90	1,508	1,694.39
1980	10	3.10	1,612	1,708.72
TOTAL			$6,890	
TOTAL PRESENT VALUE*				$8,154.75

*Compounded at a rate of 6% using a standard compound value table and carried out four places behind the decimal.

A summary of the husband's overall economic contribution appears in Table VIII.

TABLE VIII

ECONOMIC CONTRIBUTION OF HUSBAND

Indirect Contribution	$ 6,890	
Present Value of Indirect Contribution*		$ 8,154.75
Direct Contribution	246,000	
Present Value of Direct Contribution*		290,921.30
TOTAL ECONOMIC CONTRIBUTION	$252,890	
PRESENT VALUE, TOTAL ECONOMIC CONTRIBUTION*		$299,076.05

*Compounded at the rate of 6% using a standard compound table and carried out four places behind the decimal.

The percentage that each party contributed to the marriage is shown in Table IX.

TABLE IX

PERCENT OF ECONOMIC CONTRIBUTION BASED ON PRESENT VALUES

WIFE'S CONTRIBUTION	HUSBAND'S CONTRIBUTION
$109,767.76	$299,076.05
26.85%	73.15%

A court effecting an equitable distribution in this hypothetical situation would order distribution of the marital property in proportions equivalent to the economic contributions of each spouse.

Because the South Carolina Supreme Court has not recognized nonmarket household contributions alone as a sufficient basis for a special equity award,[157] the valuation of the parties' contributions must differ depending upon whether a special equity award or an equitable distribution is being sought. More-

157. See notes 45-48 & 79-80 and accompanying text *supra*.

over, selection of the method of appropriation has specific consequences in the federal tax area.

III. TAX IMPLICATIONS OF THE SETTLEMENT OF PROPERTY RIGHTS OF DIVORCING PARTIES

The determination of divorcing parties' legal and equitable rights in the property of the marriage[158] raises questions concerning the parties' tax liability that have not yet been finally resolved in South Carolina. In community property states, the equal division,[159] or approximately equal division,[160] of community property is regarded as a division of co-owned property and is not a taxable event. When property division between divorcing parties carries no tax consequences, each party takes a proportionate share of the predivorce tax basis in the subject property.[161]

The tax consequences of divisions of marital property in common-law property states are less clearly defined. In *United States v. Davis*,[162] the United States Supreme Court ruled that a property settlement upon divorce in Delaware constituted a transfer of appreciated property for which the transferor-husband incurred a tax liability on the difference between his basis in the property and its fair market value at the time of the transfer.[163] The Court further ruled that the marital rights relinquished by the wife were presumed equal to the value of the property she received and that, consequently, she had no taxable gain and her basis in the property was its fair market value at the time of the transfer.[164] The Court looked to the law of the

158. *See generally* S.C. CODE ANN. § 14-21-1020 (Supp. 1980).

159. *E.g.*, Schacht v. Commissioner, 47 T.C. 552, 557 (1967). *See* United States v. Davis, 370 U.S. 65, 69-70 (1962). One commentator has identified the rationale for this result as follows: "[N]o exchange has occurred, [and] each party is simply taking his or her proper portion, just as if co-tenants were partitioning a jointly-held asset." Hopkins, *Tax Aspects Of Divisions Of Co-Owned Property At The Time Of Divorce*, 69 ILL. B.J. 488, 489 (1981). Any apportionment other than an equal division such as retention of specific assets by one party in return for a cash payment to the other party may constitute a taxable event.

160. Rev. Rul. 76-83, 1976-1 C.B. 213.

161. Pokusa v. Commissioner, 37 T.C.M. (CCH) 434, 437 (1978).

162. 370 U.S. 65 (1962).

163. *Id.* at 71-74. *See* 26 U.S.C. §§ 71, 1001, 1002 (1976); Rev. Rul. 67-221, 1967-2 C.B. 63.

164. 370 U.S. at 72. *See* Rev. Rul. 67-221, *supra* note 163.

state in which the parties were domiciled and concluded that "the inchoate rights granted a wife in her husband's property by Delaware law [did] not even remotely reach the dignity of co-ownership."[165]

The *Davis* decision necessitates examination of the rights accorded to spouses in their marital property by the law of the state in which they are domiciled in order to determine whether a disposition of those rights more closely resembles a division of

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165. 370 U.S. at 70. The Supreme Court in *Davis* interpreted a wife's rights in her husband's property under Delaware law as follows:

> The wife has no interest—passive or active—over the management or disposition of her husband's personal property. Her rights are not descendible, and she must survive him to share in his intestate estate. Upon dissolution of the marriage, she shares in the property only to such extent as the court deems "reasonable." What is "reasonable" might be ascertained independently of the extent of the husband's property by such criteria as the wife's financial condition, her needs in relation to her accustomed station in life, her age and health, the number of children and their ages, and the earning capacity of the husband.

Id. (citations omitted). In its brief, the United States noted that

> [t]here are perhaps three ways of characterizing marital settlements for tax purposes: (1) as a transfer of property in "exchange" for the release of a legal obligation; (2) as what may be called a "division of property," simply giving to the wife that share of the husband's estate to which she is equitably entitled; or (3) as a "gift."

Brief of United States at 20. The United States conceded that nontaxable division of property is "at least a permissible characterization." *Id.* at 13. Counsel for Mr. and Mrs. Davis argued in favor of the division of property characterization by noting that

> as a legal system, it [the community property system] is, perhaps, more accurately reflective of actual marital customs and usages than its rival system. It has been asserted, with considerable justification, that the community idea exists extra-legally to a substantial degree in the common law states. Broadly speaking, the community system may be said to constitute a *de jure* recognition of a *de facto* marital partnership.

Brief of Thomas Crawley Davis and Grace Ethel Davis at 11 (quoting AMERICAN LAW OF PROPERTY § 7.5 (A.J. Casner ed. 1952)). Although the Court in *Davis* expressly stated that it was not persuaded by the community property analogy, 370 U.S. at 70, the analogy may be more persuasive today in light of growing endorsement of the partnership view of marriage. *See* note 6 *supra*. A recent publication catalogued "repeated recommendations" for legislation to reverse the *Davis* rule:

> New York State Bar Association, Tax Section, Personal Income Committee, (June, 1978).
>
> U.S. Treasury Department, Tax Reform Studies and Proposals, 91st Cong. 1st Sess. 343, n. 6 (1969).
>
> American Bar Association, Tax Section, Committee on Domestic Relations Problems, 19 Bulletin of the Section of Taxation 63-66 (1966).
>
> American Law Institute, Federal Tax Statute, February 1954 Draft, Section X107(b), X257.

BUREAU OF NATIONAL AFFAIRS, DIVORCE TAXATION HANDBOOK 73-74 (1980).

co-owned property or a taxable transfer of appreciated property.[166] The Internal Revenue Service has recognized that property is co-owned if "(1) title is taken jointly under State property law, (2) the State is a community property law State, or (3) State property law is found to be similar to community property law."[167] The similarity between South Carolina's property law and community property law will be determinative of the tax consequences that attach to divisions of marital property that is not jointly owned.[168] Because no court has identified the tax consequences accompanying apportionment of property between divorcing parties under South Carolina law, decisions interpreting the laws of other states offer the only guidance. Decisions concerning the special equity doctrine in Florida and equitable distribution in other states strongly suggest that the tax consequences to divorcing parties may differ depending on whether South Carolina courts characterize their determination of property rights in individual cases as awards in satisfaction of a special equity or as equitable distribution of marital property.[169]

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166. *See, e.g.*, Imel v. United States, 523 F.2d 853 (10th Cir. 1975); Collins v. Commissioner, 412 F.2d 211 (10th Cir. 1969), Pokusa v. Commissioner, 37 T.C.M. (CCH) 434 (1978). *See* United States v. Davis, 370 U.S. 65 (1962).

167. Rev. Rul. 74-347, 1974-2 C.B. 26, 27.

168. Jurisdiction to decide questions of federal tax liability lies with the Tax Court, *see* 26 U.S.C. § 6214 (1976), the federal courts, and the United States Supreme Court. *See* 26 U.S.C. §§ 7402, 7482 (1976). *Cf.* Morgan v. Commissioner, 309 U.S. 78, 80 (1940)("State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."); Lyeth v. Hoey, 305 U.S. 188, 193 (1938) ("The question as to the construction of [a term] in the federal statute is not determined by local law . . . . The question . . . [of] the meaning of the federal statute is a federal question."). A ruling by a state's highest court is dispositive on any issue of state law relevant to the determination of tax liability. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967). In *Davis*, the United States Supreme Court indicated that, in order for a settlement of divorcing parties' property rights to be a nontaxable event, the parties' rights in their property must "reach the dignity of co-ownership." 370 U.S. at 70. Although the South Carolina Supreme Court can definitively delineate the property rights of divorcing parties, only a federal court or, upon grant of certiorari, the United States Supreme Court can determine whether these rights reach the level of co-ownership required in *Davis*.

169. "Characterize" is meant in a full rather than a superficial sense. Because labels attached by courts to payments made in connection with divorces or separations are not dispositive, the Tax Court can make an independent inquiry into the nature of the apportionment. *See* notes 179-80 and accompanying text *infra*. Thus, characterizations consistently applied by the court over a substantial period of time would provide a stronger foundation for the determination of tax consequences.

A. *The Special Equity Award*

In 1978, the Fifth Circuit Court of Appeals ruled in *Bosch v. United States*[170] that a Florida special equity award constituted a division of existing property rights and was not a taxable event.[171] The court explained that

> if the [divorce] decree represented a tradeoff of the wife's claimed marital rights for the [property she received], then under the Supreme Court's decision in *Davis,* this would be a taxable event to the husband. If, on the other hand, the court's judgment amounted to a decree awarding to the wife an interest in property which existed prior to the divorce, . . . [it would not be a taxable event].[172]

The Fifth Circuit reasoned that "even though the special equity only comes into actual identifiable form upon the termination of the marriage status," it is unquestionably "a 'vested' right" that differs materially from the inchoate interest at issue in *Davis.*[173]

The Fifth Circuit's decision in *Bosch* was cited the following year by the Tax Court in *Mann v. Commissioner*[174] for the general proposition that "[a] special equity is . . . a vested equitable property right."[175] The Tax Court observed that the Florida divorce court's characterization of its result as a special equity award was not dispositive but nevertheless found that the recipient wife had a special equity interest in the property[176] and con-

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170. 590 F.2d 165 (5th Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980).

171. *Id.* at 168.

172. *Id.* at 167.

173. *Id.* at 167-68. The South Carolina Supreme Court has described an "inchoate interest" as one that "can not be properly denominated, an estate in lands, nor, indeed, a vested interest therein . . . ." Brown v. Brown, 94 S.C. 492, 493, 78 S.E. 447, 447 (1913)(quoting 2 H. SCRIBNER, A TREATISE ON THE LAW OF DOWER 5 (1867)). Thus, the South Carolina Supreme Court's description of the special equity as an "already vested right," *Simmons,* 275 S.C. 41, 44, 267 S.E.2d 427, 428, clearly distinguishes the special equity from an inchoate interest in South Carolina.

174. 74 T.C. 1249 (1980).

175. *Id.* at 1259.

176. *Id.* at 1261-62 (citing Capodanno v. Commissioner, 69 T.C. 638 (1978), *aff'd,* 602 F.2d 64 (3d Cir. 1979); Mirsky v. Commissioner, 56 T.C. 664 (1971)). Two issues must be examined when evaluating the effect of a determination of this type under state law. First, state authority to reach the determination must not be preempted by a federal law, and, second, a state determination must be grounded upon more than the simple attachment of a label. In McCarty v. McCarty, 101 S. Ct. 2728 (1981)(holding that federal law precluded a state from dividing military retired pay pursuant to community property law), the United States Supreme Court noted that " '"[t]he whole subject of

cluded that payment of a special equity award was not a taxable event.[177]

Although it now seems clear that an award in satisfaction of a special equity is not a taxable event in Florida,[178] the tax consequences of the South Carolina special equity doctrine are less certain. As the Tax Court noted in *Mann,* labels attached by courts to payments made in connection with divorces or separations are not dispositive,[179] and the Tax Court may make an independent inquiry into the existence of a special equity.[180] In *Bosch,* the Fifth Circuit relied on language used by the Florida Supreme Court describing the special equity as an "*already vested* equitable property [right]."[181] The South Carolina Supreme Court quoted the same language when elaborating on South Carolina's special equity doctrine.[182] This would seem to indicate that a similar result would be reached by a federal court construing South Carolina law. Moreover, the Fifth Circuit in *Bosch* noted that Florida makes a clear distinction between the special equity award and alimony,[183] and South Carolina has emphasized the same distinction.[184] Nevertheless, given the distinctions that exist between the Florida and South Carolina ap-

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the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.'" *Id.* at 2735 (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)). The court also noted that " '[s]tate and family property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overidden.' " *Id.* at 2735 (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)). In his dissent to *McCarty,* Justice Rehnquist called attention to the Court's failure to apply the test for preemption set forth in *Hisquierdo,* which explains that state law may be preempted only when "Congress [has] ' "positively required [preemption] by direct enactment. . . ." ' " *Id.* at 2745 (Rehnquist, J., dissenting)(quoting *Hisquierdo,* 439 U.S. at 581). Regarding the Tax Court's authority to make an independent inquiry into the nature of a state's apportionment of property, see notes 179 & 180 and accompanying text *infra.*

177. 74 T.C. at 1266.

178. *See* Kornfeld, *Tax Consequences of Equitable Distribution,* 1 EQUITABLE DISTRIBUTION REP. 9 (Feb. 1981).

179. 74 T.C. at 1262. *Accord,* Capodanno v. Commissioner, 69 T.C. 638 (1978), *aff'd,* 602 F.2d 64 (3d Cir. 1979); Mirsky v. Commissioner, 56 T.C. 664 (1971).

180. *See* 74 T.C. at 1261; Soltermann v. United States, 272 F.2d 387 (9th Cir. 1959).

181. 590 F.2d at 167 (quoting Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932)).

182. *See Simmons,* 275 S.C. at 44, 267 S.E.2d at 428 (citing Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932)).

183. 590 F.2d at 167 (citing Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932)).

184. 275 S.C. at 43, 267 S.E.2d at 428 (citing Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932)).

plications of the special equity doctrine,[185] it is impossible to predict with certainty whether a federal court would rule that South Carolina's special equity award constitutes a nontaxable event.[186]

B. Equitable Distribution of Marital Property

The apportionment of marital property between divorcing parties may take a variety of forms. Each party may receive a portion of all the assets, or some distribution of individual assets between the parties may be effected. Furthermore, the property may be apportioned equally or unequally between the parties. The tax consequences accompanying the apportionment of property that is not jointly owned depend on whether the property can be characterized as "co-owned" under South Carolina law.[187]

1. Establishing Co-ownership.—Following *Davis,* a number of courts wrestled with the question whether spouses' rights in marital property reached "the dignity of co-ownership" under state property laws.[188] The majority of decisions on this issue have been written by the Tenth Circuit Court of Appeals,[189] which, in its earlier decisions, interpreted state property laws in light of indicia of co-ownership suggested by the United States Supreme Court in *Davis.*[190] The Tenth Circuit in the earlier cases, found that, under property law in Colorado and Oklahoma, marital property was not co-owned and its division constituted a taxable event.[191] Subsequent to these decisions, however, the supreme courts in both Colorado and Oklahoma ruled that spouses' rights in marital property under state law

185. See notes 54-59 and accompanying text *supra.*

186. *See Domestic Relations, supra* note 42, at 82-85.

187. *See* note 167 and accompanying text *supra.*

188. For a discussion of the Supreme Court's reasoning in *Davis,* see note 165 and accompanying text *supra.*

189. Imel v. United States, 523 F.2d 853 (10th Cir. 1975); Wiles v. Commissioner, 499 F.2d 255 (10th Cir. 1974); Wallace v. United States, 439 F.2d 757 (8th Cir. 1971); Collins v. Commissioner, 412 F.2d 211 (10th Cir. 1969); Collins v. Commissioner, 388 F.2d 353 (10th Cir. 1968), *vacated,* 393 U.S. 215 (1968); Pulliam v. Commissioner, 329 F.2d 97 (10th Cir. 1964). *See also* Swaim v. Commissioner, 417 F.2d 353 (6th Cir. 1969); *In re* Questions Submitted by the United States District Court, 184 Colo. 1, 517 P.2d 1331 (1974); Collins v. Oklahoma Tax. Comm., 446 P.2d 290 (Okla. 1968).

190. 370 U.S. at 70. For the indicia of co-ownership suggested in *Davis,* see note 165 *supra.*

191. 388 F.2d at 357-58; 329 F.2d at 97, 100.

reached the level of co-ownership.[192] In later cases, the Tenth Circuit has concluded that because *Davis* took recourse to state law,[193] it would follow the determinations of the state supreme courts and has ruled that equitable distributions of property in Colorado and Oklahoma do not constitute taxable events.[194]

It is not likely that the Tenth Circuit decisions would have significant persuasive value in an analysis of the tax consequences of equitable distribution in South Carolina. The property law of each of the states examined by the Tenth Circuit expressly authorized equitable distribution of property by statute.[195] Moreover, the highest courts in each state ruled that spouses' rights in marital property resembled co-ownership.[196] By contrast, property division in South Carolina is apparently authorized by the broad family court jurisdiction statute[197] which does not provide the specific guidance given to courts by the statutes analyzed by the Tenth Circuit.[198] Furthermore, the South Carolina Supreme Court's equitable distribution decisions, unlike its special equity decisions,[199] have offered no indication that spouses have vested rights in marital property.[200] In light of the foregoing considerations, it appears that the indicia of co-ownership suggested in *Davis*[201] offer the only guidance for a determination of whether spouses' rights in marital property under South Carolina's application of equitable distribution

192. 184 Colo. at 9-10, 517 P.2d at 1335; 446 P.2d at 295.

193. 523 F.2d at 857; 412 F.2d at 212. Without expressly holding that the parties' property rights under state law must be examined, the United States Supreme Court in *Davis* embarked on an examination of their property rights under the law of Delaware. *See* 370 U.S. at 70. Given the deference to state domestic and property law that the Court has subsequently endorsed, see note 176 *supra*, it appears that the Tenth Circuit drew the correct inference.

194. 523 F.2d at 857; 412 F.2d at 212.

195. *See* 388 F.2d at 354; 329 F.2d at 98.

196. 184 Colo. at 9-10, 517 P.2d at 1335; 446 P.2d at 295.

197. *See* S.C. CODE ANN. § 14-21-1020 (Supp. 1980). The statute neither makes specific reference to equitable distribution nor provides guidelines for the manner in which property rights are to be determined.

198. *See* 388 F.2d at 354 n.2; 329 F.2d at 98.

199. *See, e.g.*, note 182 and accompanying text *supra*.

200. *E.g.*, Jeffords v. Hall, _ S.C. _, 277 S.E.2d 703 (1981); Stone v. Stone, 274 S.C. 571, 266 S.E.2d 70 (1980); Beasley v. Beasley, 264 S.C. 611, 216 S.E.2d 535 (1975); Moyle v. Moyle, 262 S.C. 308, 204 S.E.2d 46 (1974); Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961).

201. See notes 165 & 190 *supra*.

reach the level of co-ownership.[202]

In South Carolina, as in Delaware at the time of *Davis*, a wife's rights in her husband's property during marriage are inchoate.[203] Her rights are not descendible,[204] and she must survive her husband to share in his intestate estate.[205] In South Carolina, as in Delaware, each spouse upon divorce shares in the marital property to an extent deemed reasonable by the court.[206] South Carolina courts effecting equitable distributions apparently depart from the law of Delaware by considering the contributions of the parties to the acquisition of marital property[207] rather than limiting their examination to such criteria as the needs of the parties and the duration of the marriage.[208]

In summary, although examination by the South Carolina courts of the parties' respective contributions to the acquisition of marital property militates in favor of a determination that spouses' rights in marital property reach the level of co-ownership, analysis of the remaining indicia of co-ownership noted in *Davis* suggests the opposite result. While legislative enactment of a detailed equitable distribution statute or elaboration by the South Carolina Supreme Court on the rights of spouses in marital property could prove influential, a final determination of the federal income tax consequences of equitable distribution in South Carolina must await determination by a federal court. Once it can be established that marital property is "co-owned," the distinction between equal and unequal apportionment has perhaps the greatest significance for the determination of the accompanying tax consequences.

2. Equal versus Unequal Apportionment of Marital Property.—Under *Davis*, it seems clear that an equal division of co-owned assets in a common-law state is not a taxable event.[209] A

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202. See note 165 *supra*.

203. *See* Shelton v. Shelton, 225 S.C. 502, 83 S.E.2d 176 (1954); C. KARESH, WILLS 1 (1977).

204. *Cf.* C. KARESH, *supra* note 203, at 1 (South Carolina dower right entitles wife to one-third interest in husband's real property *for her life*)(emphasis added).

205. *See* S.C. CODE ANN. § 21-3-20 (1976).

206. Stone v. Stone, 274 S.C. 571, 266 S.E.2d 70 (1980); Taylor v. Taylor, 267 S.C. 530; 229 S.E.2d 852 (1976).

207. *See, e.g., Jeffords*, _ S.C. at _, 277 S.E.2d at 704; *Moyle*, 262 S.C. at 310-11, 204 S.E.2d at 47.

208. *See* 370 U.S. at 70.

209. *See* 370 U.S. at 70; Rev. Rul. 74-347, *supra* note 167.

question arises, however, concerning the distribution of property of approximately equal value between divorcing parties. One commentator has recently observed that "it now appears virtually certain that equal, 'non-pro-rata' divisions of co-owned property at the time of divorce in common law states are tax-free events."[210] The Internal Revenue Service has concluded that unequal apportionments of co-owned property between divorcing parties in common-law states result in a proportionate taxable gain to the transferor-spouse on any portion of transferred appreciated property that exceeds approximately half of the appreciated property transferred.[211] Because application of criteria discussed in section II of this article could easily lead to such a result, a determination that equitable distribution is effectively equivalent to co-ownership will not eliminate the need to consider tax consequences.

IV. Conclusion and Recommendations

Consideration of facts other than titled ownership when allocating property between divorcing parties is a relatively recent development in South Carolina. The law has evolved rapidly in this area, and the decisions of the South Carolina Supreme Court do not clearly establish whether the court intends the development of the special equity doctrine and equitable distribution as two parallel approaches to the allocation of property between divorcing parties or whether the court merely regards the terms as interchangeable. In the face of this uncertainty, the court has a unique opportunity to evolve a scheme of property allocation that reflects a carefully considered view of the nature of the marriage relationship and lays a strong foundation for determining the tax consequences of property apportionment between divorcing parties in South Carolina.

A large and still growing number of jurisdictions have endorsed a concept of marriage as a partnership between two individuals who work together to reach the goals of their choice.[212] If

210. Hopkins, *supra* note 159, at 495. The author defines "non-pro-rata divisions" as divisions that entail the allocation to each party of separate assets. *See id.* at 489.

211. *See* Rev. Rul. 74-347, *supra* note 167. For an extensive discussion of Rev. Rul. 74-347 and its implications for unequal apportionment of co-owned property, see Hopkins, *supra* note 159.

212. *See* note 6 *supra*.

the partners' inability to continue this joint venture necessitates a divorce, accumulated assets are divided in a manner analogous to the dissolution of a business partnership, and each party embarks on life independently. Despite the appeal of the partnership concept, however, it does not accurately embody the values of those couples who view their marriage as a provider-homemaker relationship. When a marriage of this type fails, one of the parties may not be equipped to divide marital assets and begin an independent life. For these individuals, an appropriate solution may be imposition of the traditional obligations of maintenance and support with a corresponding allocation of accumulated property to the party who fulfills the support obligation. Any approach the South Carolina Supreme Court ultimately fashions for allocating property between divorcing parties will constitute a statement of South Carolina's policy on the nature of the marriage relationship.

Three options for apportioning the property of a marriage are consistent with South Carolina law as analyzed in this article. By giving full consideration to evidence of nonmarket services through equitable distribution, an expansion of the special equity doctrine, or some merger of the two approaches, the court could fashion a mode of property allocation fully compatible with the partnership approach to marriage. On the other hand, by confining its consideration of evidence of nonmarket services through a more restricted approach to the special equity doctrine, the court could endorse the concept of the provider-homemaker marriage. Each of these courses, however, fails to provide for the needs of parties in a considerable number of unsuccessful marriages.

As a third option, the court could acknowledge that some marriages operate as partnerships and others are more accurately characterized as provider-homemaker relationships. By permitting proof regarding this issue and establishing a presumption in favor of one type of relationship or the other with corresponding burdens of pleading and proof,[213] the court could facilitate a form for dissolution of marriage that best accommo-

213. Because the parties to a divorce can be expected to have conflicting goals, the danger of establishing a presumption that would be unduly difficult to overcome must be guarded against. Notwithstanding this danger, the court might nevertheless wish to recognize one type of marriage relationship as more consistent with state policy.

dates individual needs and values. Upon a finding that a marriage had been operated as a partnership, consideration of evidence of nonmarket services leading to equitable distribution of the marital property would be appropriate. Alternatively, in the case of a provider-homemaker marriage, a continuing maintenance and support obligation augmented by application of the special equity doctrine to compensate for extraordinary contributions would be the better resolution. Finally, for marriage relationships that do not admit of facile categorization in either the partnership or provider-homemaker mode, both equitable distribution and the special equity doctrine could be applied.

The court could further assist the bench, bar, and citizenry by giving careful consideration to the impact that its chosen course will have on the tax consequences that accompany the allocation of property between divorcing parties. Although the tax consequences of neither the special equity award nor equitable distribution of marital property in South Carolina have been finally determined, equitable distribution is more likely to be determined to be a taxable transfer than is a special equity award.[214] Because the federal courts have jurisdiction to determine tax liability in light of state definitions of property rights,[215] it would seem logical for this state to afford its citizens maximum flexibility by accommodating both the partnership and provider-homemaker concepts of the marriage relationship. In *Commissioner v. Lester*,[216] the United States Supreme Court reached a conclusion that permits divorcing parties to determine the tax consequences of alimony and child support payments in the manner that best meets their needs.[217] The South Carolina Supreme Court, by continuing to apply the special equity doctrine[218] and by expressly ruling that divorcing parties' rights in marital property rise to the level of co-ownership in the context of equitable distribution,[219] now has the opportunity to lay a

214. *Compare* notes 203-08 and accompanying text *supra with* notes 181-84 and accompanying text *supra*.

215. See note 168 *supra*.

216. 366 U.S. 299 (1961).

217. *See id.* at 301-02.

218. See notes 178-86 and accompanying text *supra*.

219. On the basis of a similar ruling in *In re* Questions Submitted by the United States District Court, 184 Colo. 1, 517 P.2d 1331 (1974), the Tenth Circuit Court of Appeals has ruled that equitable distribution in Colorado does not constitute a taxable

strong foundation for permitting divorcing parties in South Carolina to structure the tax consequences of property allocations in the manner that best meets their needs.

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event. *See* notes 193 & 194 and accompanying text *supra*. Parties wishing to create a taxable transfer upon divorce would still be free to arrange such a transfer between themselves by expressly relinquishing property in exchange for marital rights. *See* 370 U.S. at 72.